DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-94
Title: Southern Union Company, Petitioner
v.
United States
Docketed: July 20, 2011
Linked with 10A998
Lower Ct: United States Court of Appeals for the First Circuit
Case Nos.: (09-2403)
Decision Date: December 22, 2010
Rehearing Denied: February 17, 2011
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Apr 8 2011	Application (10A998) to extend the time to file a petition for a writ of certiorari from May 18, 2011 to June 17, 2011, submitted to Justice Breyer.
Apr 12 2011	Application (10A998) granted by Justice Breyer extending the time to file until June 17, 2011.
Jun 3 2011	Application (10A998) to extend further the time from June 17, 2011 to July 17, 2011, submitted to Justice Breyer.
Jun 9 2011	Application (10A998) granted by Justice Breyer extending the time to file until July 17, 2011.
Jul 15 2011	Petition for a writ of certiorari filed. (Response due August 19, 2011)
Aug 11 2011	Order extending time to file response to petition to and including September 19, 2011.
Aug 19 2011	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed.
Sep 13 2011	Order further extending time to file response to petition to and including October 19, 2011.
Oct 19 2011	Brief of respondent United States in opposition filed.
Oct 31 2011	Reply of petitioner Southern Union Company filed.
Oct 31 2011	DISTRIBUTED for Conference of November 22, 2011.
Nov 28 2011	Petition GRANTED.
Dec 19 2011	SET FOR ARGUMENT ON Monday, March 19, 2012.
Dec 30 2011	Record received from U.S.C.A. for 1st Circuit. (1box)
Jan 12 2012	Joint appendix filed. (Statement of costs received.)
Jan 12 2012	Brief of petitioner Southern Union Company filed.
Jan 19 2012	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed.
Jan 19 2012	Brief amicus curiae of Criminal Procedure Scholars filed.

Jan 20 2012	Record from U.S.D.C. for District of Rhode Island is electronic. Record received from U.S.D.C. for District of Rhode Island consist of exhibits and transcripts (1 box)
Jan 31 2012	CIRCULATED.
Feb 13 2012	Brief of respondent United States filed. (Distributed)
Mar 12 2012	Reply of petitioner Southern Union Company filed. (Distributed)
Mar 19 2012	Argued. For petitioner: Carter G. Phillips, Washington, D. C. For respondent: Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D. C.
Jun 21 2012	Judgment REVERSED and case REMANDED. Sotomayor, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Thomas, Ginsburg, and Kagan, JJ., joined. Breyer, J., filed a dissenting opinion, in which Kennedy and Alito, JJ., joined.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
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11-94 JUL 15 2011

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No. 11-

IN THE

Supreme Court of the United States

SOUTHERN UNION COMPANY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth and Sixth Amendment principles that this Court established in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and its progeny, apply to the imposition of criminal fines.

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Southern Union Company states that it has no parent corporation and that no publicly held corporation owns ten percent or more of its stock. New England Gas Company is a division of Southern Union Company. The Company has entered into a merger agreement with Energy Transfer Equity, L.P. ("ETE"), a publicly traded partnership, pursuant to which ETE will acquire the Company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Southern Union Company respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The decision of the court of appeals, Pet. App. 1a-38a, is reported at 630 F.3d 17. Its order denying the petition for rehearing en banc, Pet. App. 49a-50a, is unreported. The opinion of the district court, Pet. App. 39a-48a, is reported at 2009 WL 2032097.

JURISDICTION

The court of appeals issued its decision on December 22, 2010. Pet. App. 1a. A timely petition for rehearing en banc was denied on February 17, 2011. *Id.* at 49a-50a. On April 12, 2011, Justice Breyer extended the time for filing this petition to and including June 17, 2011, and on June 9, 2011, granted a further extension to and including July 17, 2011. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person shall be held to answer for a . . . crime, unless on a presentment or indictment of a Grand Jury . . . nor [shall] be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all

criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

42 U.S.C. § 6928 provides, in relevant part:

> (d) Criminal penalties. Any person who –
>
> (2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter –
>
> (A) without a permit . . .
>
> shall, upon conviction, be subject to a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed two years (five years in the case of a violation of paragraph (1) or (2)), or both.

STATEMENT OF THE CASE

The decision of the First Circuit conflicts with decisions of other federal courts of appeals on the question whether the Fifth and Sixth Amendment principles that this Court established in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and its progeny, apply to the imposition of criminal fines. In *Apprendi*, this Court held that "any fact" other than the fact of a prior conviction "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. While three courts of appeals have vacated criminal fines based on the principles established by *Apprendi* and its progeny, the First Circuit categorically held that "the *Apprendi* rule does not apply to the imposition of statutorily prescribed fines." Pet. App. 2a, and, as a result, left intact the district court's fine, which was 360 times greater than the maximum fine that could

have been imposed based on the jury's verdict, finding a single day's violation of the applicable criminal statute. In so holding, the First Circuit recognized the conflict with its sister circuits and essentially invited this Court's review by acknowledging that the issue is "close" and determines the outcome in this case. *Id.*

The decision below cannot be squared with either this Court's decision in *Apprendi* or its subsequent holdings applying that decision, which do not limit *Apprendi* to incarceration. In addition, the decision presents a recurring issue of national importance because fines are a significant element of criminal sentencing and the issue posed here can be outcome determinative in numerous sentencing contexts. This Court should grant review to ensure consistent application of *Apprendi*'s principles to all penalties including criminal fines.

A. Factual Background.

Southern Union, a diversified natural gas company, was found guilty by a jury of a single count of knowingly storing mercury without a permit in violation of 42 U.S.C. § 6928(d)(2)(A), a provision of the Resource Conservation and Recovery Act ("RCRA").[1] The mercury had been collected by a division of Southern Union, New England Gas Company, in connection with an environmentally-favorable program to replace mercury seal gas pressure regulators in customers' homes with non-mercury regulators. Pet. App. 3a. The charges against Southern Union resulted from an unfortunate incident in which vandals illegally entered a storage facility owned by Southern Union in Pawtucket,

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[1] Southern Union was acquitted of two other counts, which are not at issue here.

Rhode Island, broke into a locked cabinet that contained liquid mercury, and spilled some of it on the property as well as at a nearby apartment complex. After the spill was discovered, Southern Union fully cooperated with local and state officials and the Red Cross to remediate the spill's effects and to compensate the residents of the apartment complex who were temporarily displaced – spending more than $6 million to do so. *Id.* at. 6a. This incident was the first time in Southern Union's 80-year history that it was even charged with any crime much less convicted of one.

B. Proceedings Below.

The indictment charged Southern Union with storing mercury without a permit "'[f]rom on or about September 19, 2002 until on or about October 19, 2004.'" Pet. App. 25a. As the court of appeals acknowledged, Southern Union's "prime defense at trial was that the mercury was not a waste, but rather was a commercial chemical product that the company intended to recycle."[2] *Id.* at 7a. Accordingly, the company "presented evidence at trial from which the jury could have found that for at least some of the period of the indictment, it had treated the [liquid] mercury as a recyclable resource rather than as waste." *Id.* at. 24a. For example, "Southern Union produced evidence that at several points throughout the indictment period, and as late as the

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[2] Under EPA regulations, liquid mercury is a "commercial chemical product[]" that is only regulated as a waste "if and when" it is "discarded or intended to be discarded." 40 C.F.R § 261.33. Therefore, even though mercury is a hazardous substance, it is also a commercial chemical product that can be stored for any length of time if it is being held for eventual reclamation. Such storage requires no hazardous waste permit because the material is a product, not a waste.

summer of 2004 [shortly before the end of the period charged in the indictment], Southern Union employees discussed a potential mercury recycling project." *Id.* at 33a.

The jury instructions did not direct the jury to determine the number of days or the duration of any violation that it found. As the court of appeals explained, the district court instructed the jury that in order to convict it "needed only to 'determine . . . whether at *some point* in time the liquid mercury was discarded by being abandoned' and therefore ceased to be legally held for future recycling and began to be stored as waste." Pet. App. 33a (emphasis in original). The government did not request a special interrogatory that would have asked the jury to determine the number of days or duration of any violation. The general verdict form simply tracked the indictment, and inquired "guilty" or "not guilty." *Id.* at 25a. Under RCRA, a single day's violation was sufficient for the jury to return a guilty verdict.

At sentencing, the district court applied the penalty provision of 42 U.S.C. § 6928(d), which provides for a fine of "not more than $50,000 for each day of violation." The pre-sentence report ("PSR") prepared by the U.S. Office of Probation set the maximum fine for Southern Union's offense at $38.1 million, which it arrived at by multiplying $50,000 times 762, the full number of days referred to in the indictment. Southern Union objected to this calculation on the ground that a fine of more than $50,000 would violate its constitutional rights under *Apprendi* because the jury did not determine the number of days or duration of the RCRA violation and, therefore, the maximum sentence supported by the jury's verdict was the maximum fine for a one-day violation.

The district court requested briefs on the *Apprendi* issue and produced a written decision prior to the sentencing hearing. The government's brief conceded that the jury was not asked to find, and did not find, a particular number or span of days of illegal storage. The government argued, however. that based on the dictum and reasoning of this Court's decision in *Oregon* v. *Ice*, 129 S. Ct. 711 (2009). *Apprendi* does not apply to the imposition of criminal fines, and thus the district court was authorized to find facts that increased the available fine from $50,000 (corresponding to the one day of violation reflected by the jury's verdict) to $38 million (corresponding to 762 days of violation).

District Court Decision and Sentencing. The district court initially concluded that Southern Union waived its *Apprendi* argument because of its "failure to respond to the Court's invitation for even greater specificity in the verdict form, its assent to the use of the Indictment language, and its failure to formally place an objection on the record." Pet. App. 43a n.1. The court nevertheless addressed "the substance" of Southern Union's argument. *Id.*

On the merits, the district court "reject[ed] the notion that *Apprendi* does not apply to fines," expressly stating that it "does not believe, as the Government argues, that the Supreme Court recently indicated in *dicta* anything to the contrary." Pet. App. 44a (citing *Oregon* v. *Ice*, 129 S. Ct. 711, 719 (2009)). With respect to the *Ice* dicta, the district court concluded that "[t]he best that can be said about" the question is that "*Apprendi* does not prevent a Court from engaging in judicial fact finding to determine the amount of a penalty *within* the prescribed statutory maximum range, which is something entirely different from finding a fact that

determines the range." *Id.* at 45a (emphasis in original).

Applying the *Apprendi* principles, the district court examined § 6928(d) and found that "the statutory maximum penalty" under this provision "can only be determined in any particular case after a factual finding is made concerning the number of days a defendant violated the statute." Pet. App. 45a. It then concluded that "[b]ecause the maximum statutory penalty is tied to the length of the violation, *Apprendi* and its progeny requires the jury, and not the Court, to find the dates needed to calculate the maximum fine." *Id.*

The district court nevertheless concluded that there was no *Apprendi* violation in its finding a RCRA violation of 762 days because the "content and context of the verdict all together" indicated that the jury determined the necessary dates. Pet. App. 46a, notwithstanding its instruction to the jury that it could convict if it found that Southern Union "'at *some point* in time'" began storing the mercury as waste (and thereby violated RCRA), *id.* at 33a (emphasis in original). The district court reasoned that "[f]rom the verdict form, it is clear that the jury conclusively found beyond a reasonable doubt that the Defendant's conduct ended on October 19, 2004 and that it began 'on or about' September 19, 2002." *Id.*; see also *id.* at 47a (noting that "the evidence introduced was clear. . . . that the precise date for establishing the maximum penalty is in fact September 19, 2002").

The district court therefore overruled Southern Union's objection to the PSR and "set the maximum fine that may be imposed against the Defendant at $38.1 million as stated in the pre-sentence report."

Pet. App. 48a. After a sentencing hearing, the district court imposed a $6 million fine and a $12 million "'community service obligation.'" *Id.* at 24a.[3] Southern Union appealed both the verdict and its sentence.

First Circuit Decision. In addition to rejecting Southern Union's other challenges to the verdict, which are not at issue here, the First Circuit rejected Southern Union's challenges to its sentence. The court of appeals first held that "Southern Union adequately preserved an objection" to the fine on the ground that it was imposed in violation of *Apprendi* because Southern Union had raised this objection at sentencing. Pet. App. 24a. The court of appeals specifically noted that "[t]he prosecution did not seek the district court's waiver ruling and does not press it on appeal." *Id.* at 24a n.12; see also Br. for the Appellee, United States of America at 38, *United States* v. *S. Union Co.*, No. 09-2403 (1st Cir. Apr. 7, 2010) ("U.S. First Cir. Br.") (the government "does not press the [district] court's waiver ruling – a ruling it did not seek below").

On the merits, the court of appeals described the *Apprendi* issue as one of "initial impression" that was both "important" and "close." Pet. App. 1a-2a. The court first considered this Court's holdings in *Apprendi* and its progeny. It acknowledged that "[t]hese cases do not distinguish among types of 'penalties' or 'punishment,' leaving the broad language unglossed," but concluded that none of the

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[3] The district court specifically noted that the $12 million community service obligation was not restitution. *See* Sentencing Transcript at 54, *United States* v. *S. Union Co.*, No. 07-1345 (D.R.I. Oct. 2, 2009) ("The fourth [sentencing] factor [the court must consider] is restitution, and I don't see that to be a factor at all in this case.").

cases expressly addresses whether criminal fines are encompassed within the *Apprendi* rule. *Id.* at 27a.

It then concluded that "the *Apprendi* rule does not apply to the imposition of statutorily prescribed fines," Pet. App. 2a, relying on two aspects of this Court's decision in *Oregon* v. *Ice*, 129 S. Ct. 711 (2009). This Court in *Ice* rejected an *Apprendi* challenge to a state sentencing provision that allowed judges to find facts justifying the imposition of consecutive, rather than concurrent, sentences of incarceration following the jury's verdict convicting the defendant of multiple crimes. *First*, the court of appeals relied on a reference in *Ice* to criminal fines, although it conceded the reference was "dicta." Pet. App. 28a. The court of appeals stated:

> Observing that many states permit judicial fact-finding on matters 'other than the length of incarceration,' the Court explained that '[t]rial judges often find facts about the nature of the offense or the character of the defendant in determining, for example, the length of supervised release following service of a prison sentence; required attendance at drug rehabilitation programs or terms of community service; and *the imposition of statutorily prescribed fines* and orders of restitution.' The Court warned that applying *Apprendi* to these types of determinations 'surely would cut the rule loose from its moorings.'

Id. at 28a-29a (quoting *Ice*, 129 S. Ct. at 719) (emphasis in original; internal citation and footnote omitted). The court of appeals concluded that this dicta was entitled to "great weight" and characterized it as "an express statement . . . that it is inappropriate to extend *Apprendi* to criminal fines." *Id.* at 28a.

Second, the First Circuit relied on this Court's consideration in *Ice* of "the history at common law of the practice . . . challenged," which the court of appeals viewed as a "logic and method" that "alter[ed] any previous broad understanding of *Apprendi*." Pet. App. 28a; see also *id.* at 31a (noting that its view that *Ice* "has effected a change in the application of the *Apprendi* rule" is supported by the dissent in *Ice*, which "stated that the majority opinion had altered the method of analysis underlying *Apprendi*"). Applying what it viewed to be *Ice*'s "reasoning and logic," the court of appeals stated that "it is now highly relevant that, historically, judges assessed fines without input from the jury." *Id.* at 30a. Indeed, the court of appeals concluded that the government presented "strong evidence of historic practice that at common law, judges' discretion in imposing fines was largely unfettered." *Id.* at 31a.

The First Circuit, however, acknowledged that its decision conflicts with that of its sister circuits. In a footnote, the First Circuit pointed out that two circuits "have applied *Apprendi* to criminal fines" – one before *Ice* and one after – but simply noted that these cases "could not or did not discuss *Ice*." Pet. App. 32a n.17 (citing *United States* v. *Pfaff*, 619 F.3d 172 (2d Cir. 2010), and *United States* v. *LaGrou Distrib. Sys., Inc.*, 466 F.3d 585 (7th Cir. 2006)).

The First Circuit also held, "[i]n the interest of judicial economy and efficiency," that "if we are wrong and if *Apprendi* does apply to criminal fines, it would be necessary to remand for resentencing" because "[t]he district court erred in holding, despite the absence of a special interrogatory, that the jury necessarily found beyond a reasonable doubt that Southern Union had violated RCRA during all or nearly all of the date range in the indictment." Pet.

App. 32a-33a. The court of appeals noted that the government "essentially concedes and we agree" that "the jury did not necessarily determine the number of days of violation." See U.S. First Cir. Br. at 38 ("the government concedes that the [district] court's verdict-based ruling reads too much into the 'on or about' dates and the quoted instruction. Put simply, the jury was not asked to find a particular number or span of days of illegal storage"). The court also "reject[ed] the prosecution's suggestion that the evidence was so overwhelming that no reasonable jury could conclude other than that the mercury was treated as waste throughout the period in the indictment." Pet. App. 33a-34a. In short, the court of appeals concluded that "any error under *Apprendi* was not harmless." *Id.* at 2a.[4]

The First Circuit denied rehearing and rehearing en banc.

REASONS FOR GRANTING THE PETITION

The decision below merits review because it conflicts with the decisions of other courts of appeals on the important question of whether the *Apprendi* principle applies to criminal fines. The decision also conflicts with the clear holding in *Apprendi* and this Court's subsequent decisions. To the extent the issue has been clouded by the dicta in *Ice*, only this Court's review can bring the needed clarity to this important and recurring Fifth and Sixth Amendment issue.

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[4] The court of appeals also rejected Southern Union's argument that the fine imposed was excessive. Pet. App. 35a-38a. That ruling is not challenged here.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS THAT APPLY THE *APPRENDI* PRINCIPLE TO CRIMINAL FINES.

This Court held in *Apprendi* that "any fact" other than the fact of a prior conviction "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. *Apprendi* does not speak only to incarceration, and this Court has not construed it that way. Since *Apprendi* was decided, this Court has applied its holding in contexts involving enhanced penalties, including death. See, *e.g.*, *Blakely* v. *Washington*, 542 U.S. 296 (2004); *Ring* v. *Arizona*, 536 U.S. 584 (2002); *United States* v. *Booker*, 543 U.S. 220 (2005); and *Cunningham* v. *California*, 549 U.S. 270 (2007). It also has clarified that the "statutory maximum" for *Apprendi* purposes is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely*, 542 U.S. at 303 (emphasis in original).

Other courts of appeals have applied the principles established in *Apprendi* and its progeny to criminal fines, and have vacated and remanded criminal fines as a result. In *United States* v. *LaGrou Distribution Systems, Inc.*, 466 F.3d 585, 594 (7th Cir. 2006), for example, the Seventh Circuit vacated and remanded a $1 million fine imposed pursuant to 18 U.S.C. § 3571(d)[5] on a corporate defendant that was

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[5] Pursuant to 18 U.S.C. § 3571(c), an organizational defendant that has been found guilty of a felony offense may be sentenced to a statutory fine of $500,000. Alternatively, under § 3571(d), any person who derives a pecuniary gain from an offense, or causes a pecuniary loss, can be fined not more than the greater

convicted by a jury of violating federal food safety laws, where "at sentencing, it was the district judge using a preponderance of the evidence standard to find the loss amount, not a jury finding loss amount beyond a reasonable doubt." The Seventh Circuit held that this procedure constituted "error" because "[t]he Sixth Amendment requires that any fact (other than the fact of prior conviction) that increases the maximum 'penalty' for a crime beyond the prescribed statutory maximum must be proved to a jury beyond a reasonable doubt." 466 F.3d at 594 (quoting *Apprendi*, 530 U.S. at 490).

Notably, the government confessed error in *LaGrou*. It "concede[d] that the [*Apprendi*] rule does apply to criminal fines because they are penalties for criminal offenses" and "concede[d]" that the $1 million fine had to be vacated and remanded for resentencing because "the district court did not purport to apply a beyond-a-reasonable doubt standard of proof as to the gross loss amount that was the basis for increasing the fine beyond the prescribed $500,000 maximum." Br. and App. of the United States at 33-34, *United States* v. *LaGrou*, No. 05-3361 (7th Cir. Dec. 20, 2005); see also *id.* at 33 ("*Apprendi* does apply to monetary fines, that is, any fact increasing the maximum fine above the prescribed statutory maximum must be proven beyond a reasonable doubt"). The government expressly noted in its brief that "[t]his concession was made in consultation with the Office of the Solicitor General." *Id.* at 33 n.12.

The Second Circuit similarly vacated and remanded a criminal fine as violating the *Apprendi* principle in

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of twice the defendant's gross gain or twice the victim's gross loss.

United States v. *Pfaff*, 619 F.3d 172 (2d Cir. 2010), *cert. denied*, 79 U.S.L.W. 3728 (June 27, 2011) (Nos. 10-1049 & 10-1061), applying a plain error standard. In *Pfaff*, an individual was convicted of twelve counts of tax evasion and fined $6 million pursuant to § 3571(d). The "jury, however, made no findings regarding the amount of pecuniary loss caused, or gain derived, by [the defendant] through his crimes." *Id.* at 174. Instead, the district court made a finding of the amount of pecuniary loss caused, and used its finding to calculate the defendant's maximum fine under § 3571(d). *Id.*

The Second Circuit held that this was error under *Apprendi* because the $6 million fine was "supported only by the district court's own pecuniary loss finding," absent which the maximum fine supported by the jury's verdict alone would have been $3 million. *Id.* at 175; see also *id.* ("it is the clear implication of *Apprendi* and *Blakely* that when a jury does not make a pecuniary gain or loss finding, § 3571's default statutory maximums cap the amount a district court may fine the defendant"). The court of appeals further found this error to be "plain" because the analysis "flow[ed] ineluctably from *Apprendi* and *Blakely*." *Id.* at 175-76.[6]

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[6] The government did not argue in *Pfaff* that the *Apprendi* principle is inapplicable to criminal fines. Instead, the government argued that there was no *Apprendi* violation in that case because the fine did not exceed the statutory maximum. Br. for the United States at 205-08, *United States* v. *Pfaff*, No. 09-1702 (2d Cir. Jan. 15, 2010). The government's brief in *Pfaff* was filed one year after this Court issued its decision in *Ice*, and also after the government argued in its district court brief in this case that the *Apprendi* principle does not apply to fines. In addition, the government did not seek *certiorari* on the sentencing issue.

Similarly, in *United States* v. *Yang*, 144 F. App'x. 521 (6th Cir. 2005), the Sixth Circuit vacated and remanded a $5 million criminal fine against a closely-held corporation on the ground that it violated *Booker*, again applying a plain error standard. The court of appeals noted that it was "undisputed that, pursuant to the mandatory federal sentencing guidelines in place at the time, the district court enhanced [the corporation's] sentence based on the court's factual findings" concerning the amount of the loss caused by the corporation's criminal acts, and held that this enhancement of the fine "based on judge-found facts under a mandatory guidelines system" constituted Sixth Amendment error that was "plain." *Id.* at 524.

At least one other court of appeals has assumed that the *Apprendi* principle applies to the imposition of criminal fines. In *United States* v. *West Coast Aluminum Heat Treating Co.*, 265 F.3d 986, 994 (9th Cir. 2001), the Ninth Circuit addressed the merits of an *Apprendi* challenge to a corporate criminal fine imposed under § 3571, and found no *Apprendi* violation only because the fine did not exceed the statutory maximum. In addition, several federal district courts[7] and state supreme courts[8] have

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[7] *See, e.g., Damper* v. *United States*, 2006 U.S. Dist. LEXIS 53800, at *7 (S.D. Miss. July 11, 2006) (addressing *Apprendi* challenge to fine, but finding no violation because the fine was within the statutory maximum); *Lauria* v. *United States*, 2006 U.S. Dist. LEXIS 90010, at *63 n.14 (D. Conn. Dec. 13, 2006) (same); *Shkolir* v. *United States*, 2002 U.S. Dist. LEXIS 9830, at *5 (S.D.N.Y. May 31, 2002) (same); *United States* v. *Boothe*, 2001 U.S. Dist. LEXIS 16745, at *18-19 (E.D. La. Oct. 5, 2001) (same).

[8] *State* v. *Cain*, 888 A.2d 276, 279-81 (Me. 2006) (addressing *Apprendi* challenge to fine, but finding no violation because the

assumed that the *Apprendi* principle applies to the imposition of criminal fines. Commentators likewise have observed that the *Apprendi* principle logically applies to the imposition of criminal fines.[9]

The court of appeals' ruling below is wholly at odds with all of these authorities. The First Circuit unequivocally held that "the *Apprendi* rule does not apply to the imposition of statutorily prescribed fines." Pet. App. 2a. As a result, it did not address the merits of Southern Union's *Apprendi* challenge, and affirmed the fine in its entirety – a fine 360 times greater than that supported by the jury's verdict. Moreover, the court of appeals acknowledged that the Second and Seventh Circuits "have applied *Apprendi* to criminal fines," but made no attempt to harmonize the conflict, other than to note that these other cases "could not or did not discuss *Ice*." *Id.* at 32a n.17. At the same time, the court of appeals essentially invited this Court's review by acknowledging that the issue is "close" and by stating several times in its opinion that if its holding that the *Apprendi* principle does not apply to criminal fines is "wrong," then a

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fine was within the statutory maximum); *State* v. *Kozlowski*, 898 N.E.2d 891, 909 (N.Y. 2008) (addressing *Apprendi* challenge to fines, but finding that any *Apprendi* violation was harmless because defendants' own trial testimony established the facts supporting the fines).

[9] *See, e.g.*, Phillip C. Zane, *Booker Unbound: How the New Sixth Amendment Jurisprudence Affects Deterring and Punishing Major Financial Crimes and What to Do About It*, 17 Fed. Sent'g Rep. 263, 263 (2005) ("The recent Sixth Amendment jurisprudence that culminated in *Booker* will have an effect on the determination of a fine. . . ."); John M. Connor & Robert H. Lande, *How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines*, 80 Tul. L. Rev. 513, 562-63 (2005); Timothy A. Johnson, *Sentencing Organizations After* Booker, 116 Yale L. J. 632, 661 n.201 (2006).

remand is necessary. *Id.* at 2a, 32a-33a, 34a. Of course, only this Court is in a position to decide that question.

In sum, it is clear that if Southern Union had challenged the fine levied against it based on *Apprendi* in the Second, Sixth, and Seventh Circuits, those courts would have addressed the claim on the merits. Accordingly, the decision below creates a fundamentally different legal regime for the imposition of criminal fines in the First Circuit. The prospect that criminal defendants in the First Circuit who receive and challenge criminal fines have categorically different protections under the Fifth and Sixth Amendments is intolerable. This is precisely the kind of decision by geography that this Court grants certiorari to prevent.

This case is an appropriate vehicle for resolving this circuit conflict because the facts governing the *Apprendi* issue are straightforward and fully developed in the record. In addition, the First Circuit conceded that the question of *Apprendi*'s applicability is dispositive and outcome determinative in this case. Pet App. 32a-33a ("if we are wrong and if *Apprendi* does apply to criminal fines, it would be necessary to remand for resentencing"); see also *id.* at 2a ("any error under *Apprendi* was not harmless"). By granting the petition, this Court would provide meaningful guidance concerning whether *Apprendi* applies to the imposition of criminal fines.[10]

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[10] This petition does not raise or implicate the distinct question whether *Apprendi* applies to the imposition of restitution in criminal cases. *See* Pet. App. 29a n.14 (noting that the First Circuit previously has held that the statutory scheme for restitution "does not trigger the principles underlying *Apprendi* because the jury's verdict of guilt automatically

II. THE COURT OF APPEALS' RULING UNDERMINES CRIMINAL DEFENDANTS' FIFTH AND SIXTH AMENDMENT RIGHTS.

The court of appeals' ruling merits this Court's review because it is not faithful to the Fifth and Sixth Amendments, and undermines the fundamental protections that this Court held in *Apprendi* and subsequent cases derive from those Amendments.

The language of *Apprendi* and its progeny broadly applies to the imposition of criminal *punishment* or *penalties* – without any qualification or limitation. See, *e.g.*, *Apprendi*, 530 U.S. at 490 (holding that "any fact" other than the fact of a prior conviction "that increases the *penalty for a crime* beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (emphasis added); *Ring*, 536 U.S. at 602 ("If a State makes an increase in a defendant's authorized *punishment* contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt") (emphasis added); *Blakely*, 542 U.S. at 304 (a judge exceeds his authority when he "inflicts *punishment* that the jury's verdict alone does not allow") (emphasis added); *Booker*, 543 U.S. at 232 (the jury must "find the existence of any particular fact that

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authorizes restitution in the full amount of the victim's losses"); *Pfaff*, 619 F.3d at 175 (noting prior Second Circuit holdings that *Apprendi* does not apply to criminal restitution or forfeiture based on court-determined loss or gain amounts because "criminal restitution and forfeiture are indeterminate schemes without statutory maximums"); *LaGrou*, 466 F.3d at 593 (noting that the Seventh Circuit "has consistently held that restitution is a civil remedy, not penal," and therefore the *Apprendi* line of cases does not apply). As shown, the district court expressly stated that the sentence did not involve restitution. *See* n.3, *supra*.

the law makes essential to [a defendant's] *punishment*") (internal quotation marks omitted; emphasis added). As the court of appeals itself acknowledged, "[t]hese cases do not distinguish among types of 'penalties' or 'punishment,' leaving the broad language unglossed." Pet. App. 27a.

As we already have shown, courts other than the First Circuit below consistently have held (or assumed) that the *Apprendi* principle applies to the imposition of criminal fines. See Section I, *supra*. The First Circuit departed from its sister circuits and what it acknowledged is the "unglossed" language of this Court's prior decisions based on its interpretation of this Court's opinion in *Ice*. As noted, the court of appeals relied on a reference in *Ice* to criminal fines that it conceded was "dicta." Pet. App. 28a. The court of appeals also relied on this Court's consideration in *Ice* of "the history at common law of the practice . . . challenged," which the court of appeals viewed as a "logic and method" that "alter[ed] any previous broad understanding of *Apprendi*." *Id.* Neither rationale provides a valid basis for the court of appeals' holding that *Apprendi* does not apply to the imposition of criminal fines.

With respect to this Court's reference in *Ice* to criminal fines, it is undisputed that *Ice* itself did not involve any issue concerning a criminal fine. Rather, the question before the Court was whether "the Sixth Amendment mandate[s] jury determination of any fact declared necessary to the imposition of consecutive, in lieu of concurrent, sentences[.]" *Ice*, 129 S. Ct. at 714. Moreover, *Ice* specifically limited its holding to the multiple conviction context: "When a defendant has been tried and convicted of multiple offenses, each involving discrete sentencing prescriptions. . . . " *Id.* Accordingly, under this

Court's long-standing precedent, its dicta in *Ice* concerning fines cannot be controlling because "this Court does not decide important questions of law by cursory dicta inserted in unrelated cases." *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 775 (1968); see also *Cent. Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363 (2006) (this Court is "not bound to follow [its] dicta in a prior case in which the point now at issue was not fully debated").

In any event, to the extent that the "cursory dicta" in *Ice* should be construed, the district court correctly determined that "[t]he best that can be said about" the question is that this Court was suggesting that *Apprendi* should not be construed to "prevent a Court from engaging in judicial fact finding to determine the amount of a penalty *within* the prescribed statutory maximum range, which is something entirely different from finding a fact that determines the range." Pet. App. 45a (emphasis in original). In the *Ice* dicta, this Court was addressing judicial fact-finding "about the nature of the offense or the character of the defendant" – classic inquiries that sentencing courts undertake to assess the amount of a fine *within a prescribed range*. Accordingly, nothing in *Ice* suggests that this Court was addressing the fundamentally different type of judicial fact-finding at issue here: judicial fact-finding that determines whether a crime was committed on any of the days charged in the indictment, and if so, on which days.

As *Ice* itself recognized, *Apprendi* and its progeny "are rooted in the historic jury function – determining whether the prosecution has proved each element of an offense beyond a reasonable doubt." 129 S. Ct. at 714. Yet here, where the jury's verdict was limited to a single day's violation, the First Circuit affirmed the

district court's imposition of a sentence based on its own finding that the prosecution had proved each element of the offense beyond a reasonable doubt for each of the 762 days charged in the indictment.

The First Circuit also declared that *Ice* "alter[ed] any previous broad understanding of *Apprendi*" by requiring an analysis of historic sentencing practices. Pet. App. 28a. As an initial matter, the court of appeals' suggestion that *Ice* employed a new "logic and method" that "alter[ed] any previous broad understanding of *Apprendi*," *id.*, is puzzling because this Court in *Apprendi* engaged in that very analysis of common law and historic sentencing practices and relied upon those practices in ascertaining the Founders' understanding of the Sixth Amendment's jury trial guarantee. *Apprendi*, 530 U.S. at 478-83; *id.* at 501-18 (Thomas, J., concurring). As this Court has stated, the *Apprendi* "rule is rooted in longstanding common-law practice." *Cunningham*, 549 U.S. at 281; see also *Harris* v. *United States*, 536 U.S. 545, 557 (2002) (plurality opinion) ("*Apprendi* said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime – and thus the domain of the jury – *by those who framed the Bill of Rights*") (emphasis added); *Blakely*, 542 U.S. at 302 (stating that the *Apprendi* principles "have been acknowledged by courts and treatises since the earliest days of graduated sentencing" and that this Court "compiled the relevant authorities in *Apprendi*").

In any event, the First Circuit's historical analysis is fundamentally flawed because it misapprehends this Court's reasoning and conclusions in *Apprendi* that were based on historical sentencing practices. When this Court's reasoning and conclusions are

properly understood, the First Circuit's holding that the *Apprendi* principles do not apply to the imposition of criminal fines cannot withstand scrutiny.

In *Apprendi*, this Court found that any distinction between an element of an offense and a sentencing factor was "unknown" to criminal practice "as it existed during the years surrounding our Nation's founding." *Apprendi*, 530 U.S. at 478. This was so, the Court explained, because judges in that period had "very little explicit discretion in sentencing" with respect to felonies because substantive criminal laws were "sanction-specific," *i.e.*, they "prescribed a particular sentence for each offense." *Id.* at 479. This distinction was also unknown in the common law of punishment for misdemeanors, which was "dependent upon judicial discretion" because judges were subject to few restraints in sentencing offenders to the most commonly imposed punishments of "fines or whippings." *Id.* at 480 n.7. This Court also noted that there was a "19th century shift in this country from statutes providing fixed-term sentences to those providing judges discretion within a permissible range." *Id.* at 481; see also *id.* ("We have often noted that judges in this country have long exercised discretion . . . in imposing sentences *within statutory limits* in the individual case") (emphasis in original) (citing *Williams* v. *New York*, 337 U.S. 241, 246 (1949)).

Based on this "historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided," this Court concluded in *Apprendi* that the proper understanding of the Sixth Amendment jury trial guarantee is that it does not permit "a legislative scheme that removes the jury

from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." 530 U.S. at 482-83 (emphasis in original). As this Court further explained in *Blakely*, this rule gives "intelligible content to the right of jury trial" by "ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended." *Blakely*, 542 U.S. at 305-06.

Against the background of this Court's historical analysis in *Apprendi*, the First Circuit's reasoning and conclusion are misguided. The court of appeals first noted that in light of *Ice*, "it is now highly relevant that, historically, judges assessed fines without input from the jury." Pet. App. 30a. This ignores, however, that, as *Apprendi*'s discussion makes clear, judges historically assessed *all forms of criminal punishment* without input from the jury. Accordingly, the fact that judges historically imposed fines does not provide any support for the court of appeals' conclusion that the *Apprendi* rule does not apply to the imposition of criminal fines.

The courts of appeals further relied on the fact that judges historically had "discretion to determine the amount of any fine imposed." Pet. App. 30a; see also *id.* at 31a (noting that "at common law, judges' discretion in imposing fines was largely unfettered"). The court of appeals stated that this sentencing practice was "in direct contrast with the Supreme Court's reasoning in the *Apprendi* context" that English judges had little sentencing discretion. *Id.* at. 30a. The First Circuit's attempt to distinguish *Apprendi* on this ground misapprehends this Court's

historical discussion in *Apprendi*. *Apprendi* did not hold or suggest that modern sentencing practices are subject to the *Apprendi* rule only if they derive from common law sentencing practices that minimized judicial discretion. Instead, this Court in *Apprendi* simply compiled and examined common law sentencing practices – some of which constrained judicial discretion and some of which did not – as well as the subsequent American shift to sentencing ranges, to determine the nature and extent of judicial discretion in sentencing that is consistent with the Sixth Amendment's jury trial guarantee.

As noted, the Court concluded from all of the historical evidence that the fundamental limit that the Sixth Amendment imposes on judicial sentencing is that judicial fact-finding cannot "expose[] the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Apprendi*, 530 U.S. at 482-83 (emphasis in original). See also *id.* at 481 ("We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion – taking into consideration various factors relating both to offense and offender – in imposing a judgment *within the range* prescribed by statute") (emphasis in original). Nothing in this analysis supports the First Circuit's conclusion that *Apprendi* does not apply to fines because judges at common law had discretion in assessing fines.

Moreover, the fact that this Court in *Apprendi* was well aware of and expressly noted that judges historically had discretion in assessing fines and certain other forms of punishment further underscores that the First Circuit reached the wrong result. Because this Court's historical analysis in

Apprendi relied in part on sentencing practices concerning fines and encompassed all forms of punishment imposed at common law without qualification, the First Circuit was wrong to conclude that there is a separate common law history concerning the imposition of fines that leads to a different interpretation of the Sixth Amendment as applied to them.

Indeed, this Court's conclusions in *Apprendi* about the Founders' understanding of the Sixth Amendment's jury trial guarantee are arguably on a stronger historical footing with respect to fines than incarceration because in both England and the colonies, fines were one of "the two main forms of noncapital punishment" at the time the Bill of Rights was drafted (the other being corporal punishments such as "whippings"), while imprisonment did not even emerge as a common penological practice in the United States until the late eighteenth and the early nineteenth century.[11] Therefore, the historical analysis that this Court relied on to derive the *Apprendi* rule applies with equal force to both criminal fines and incarceration. The First Circuit's holding to the contrary simply cannot be squared with *Apprendi*'s historical analysis.

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[11] Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About* Apprendi, 82 N.C. L. Rev. 621, 640-41 (2004); *see also id.* at 642-43 (noting that some States "initially resisted imprisonment as a punishment" and "a few did not change their practices at all" until after the Civil War); Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 Am. J. Legal Hist. 326, 329 (1982) ("Imprisonment, although provided for as a punishment in some colonies, was not a central feature of criminal punishment until a later time").

III. THE COURT OF APPEALS' RULING POSES AN ISSUE OF FUNDAMENTAL IMPORTANCE.

The court of appeals' ruling that the *Apprendi* principle does not apply to the imposition of criminal fines also presents a recurring and "important question" of federal law that warrants this Court's review. See Sup. Ct. R. 10(c).

As a general matter, this Court's frequent return in recent years to issues raised by its *Apprendi* decision reflects its commitment to ensuring that the Fifth and Sixth Amendment principles governing criminal sentencing are applied consistently across the country. This Court has granted certiorari in a number of cases to resolve conflicts and issues concerning the scope and application of *Apprendi* and its growing progeny. See, *e.g.*, *Harris*, 536 U.S. 545; *Ring*, 536 U.S. 584; *Blakely*, 542 U.S. 296; *Booker*, 543 U.S. 220; *Cunningham*, 549 U.S. 270; *Rita* v. *United States*, 551 U.S. 338 (2007); and *Ice*, 129 S. Ct. 711.

In addition, the implications of the issues raised in this case are enormous. Criminal fines are a significant element of criminal sentencing, both for individuals and corporations, particularly in an era of increasing criminal enforcement of regulatory violations and vigorous enforcement of anti-corruption laws. In 2010, 9.3% of criminal sentences in the federal courts involved fines.[12] For

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[12] *See* U.S. Sentencing Comm'n, *2010 Annual Report*, at 32 (chart), *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/ar10toc.htm. The U.S. Sentencing Commission receives reports of the sentences imposed for "all felony offenses and all Class A misdemeanors in the United States courts." *Id.* at 30 n.57.

corporations and other organizational defendants, 77% of criminal sentences in the federal courts involved fines.[13] The average fine imposed on an organizational defendant in 2010 was more than $16.3 million, and the largest fine was $1.195 billion (on a pharmaceutical corporation for violations of food and drug laws).[14] In total, federal courts imposed fines on more than 7700 offenders in 2010.[15]

Moreover, as the United States has conceded, there are numerous sentencing provisions in the United States Code and in state codes that can give rise to *Apprendi* issues. The United States told the First Circuit that holding that *Apprendi* applies to fines would "have far-reaching ramifications" because "[m]any other federal statutes have similar maximum-fine-per-day-of-violation provisions" that implicate *Apprendi* issues in precisely the way the RCRA provision did here. U.S. First Cir. Br. at 43 (citing numerous federal statutes); *id.* at 43-46 (citing multiple statutes from more than 40 States). In addition, *Apprendi* issues can arise in connection with penalty provisions that assess fines based on monetary gain to the wrongdoer or loss to the victims, such as 18 U.S.C. § 3571, the federal criminal code's general fine provision that gave rise to the *Apprendi* issues in *LaGrou* and *Pfaff*.

Given the multitude of sentencing contexts in which this issue has arisen and will continue to arise, and the numerous criminal defendants who are

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[13] *Id.* at 38.

[14] *Id.*

[15] U.S. Sentencing Comm'n, *2010 Sourcebook of Federal Sentencing Statistics*, Table 15, *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Table15.pdf.

affected by it, the First Circuit's ruling poses a recurring question of fundamental importance that warrants this Court's attention. It is vital that this Court grant review to ensure that defendants' Fifth and Sixth Amendment rights are protected when they are sentenced to criminal fines.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 15, 2011

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
FIRST CIRCUIT.

No. 09-2403.

UNITED STATES OF AMERICA,
Appellee,

v.

SOUTHERN UNION COMPANY,
Defendant, Appellant.

Heard Oct. 6, 2010.
Decided Dec. 22, 2010.

As Corrected Jan. 6, 2011.
As Corrected Feb. 16, 2011

Before LYNCH, *Chief Judge*, SELYA and THOMPSON, *Circuit Judges*.

LYNCH, *Chief Judge*.

This appeal by Southern Union, a natural gas company convicted by a jury of storing hazardous waste without a permit, raises two issues of initial impression. First, the case tests whether *federal* criminal enforcement may be used under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928(d), where certain federally approved *state* regulations as to hazardous waste storage have been violated. Second, the case also raises the important question of whether a criminal fine must be vacated under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), where a judge, and not a jury, determined the facts as to the number of days of violation under a schedule of fines.

The hazardous waste at issue in this case is mercury, which can poison and kill those exposed to it. *See* 40 C.F.R. § 261.33(f) tbl. (listing mercury as hazardous waste due to toxicity). Here, 140 pounds of mercury became the play toy of young vandals who spread it about, including at their homes in a local apartment complex, after they spilled it around Southern Union's largely abandoned and ill-guarded Tidewater site in Pawtucket, Rhode Island.

We affirm the district court's rulings on Southern Union's conviction, as set forth in *United States v. Southern Union*, 643 F.Supp.2d 201 (D.R.I.2009) (*Southern Union I*). We conclude that:

> (1) Southern Union is precluded by 42 U.S.C. § 6976(b) from challenging the EPA's 2002 Immediate Final Rule authorizing Rhode Island's RCRA regulations. Having failed to use the statutory procedure for judicial review, Southern Union may not raise the issue by collateral attack;
>
> (2) the 2002 Rule, in any event, is valid and was within the EPA's authority to adopt; and
>
> (3) the conviction does not violate Southern Union's right to fair notice under the Due Process Clause.

We also affirm the fine imposed. The *Apprendi* issue is close but the Supreme Court's recent decision in *Oregon v. Ice*, 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517 (2009), leads us to hold that the *Apprendi* rule does not apply to the imposition of statutorily prescribed fines. If, however, we were wrong in our assessment of the *Apprendi* issue, we would find that any error under *Apprendi* was not harmless and that the issue of the fine would need to be remanded.

Finally, we also hold that the financial penalties imposed did not constitute an abuse of the district court's discretion.

I. *SOUTHERN UNION'S MERCURY STORAGE AND RELEASE*

Southern Union, a Texas-based natural gas distributor, began supplying natural gas to Rhode Island and Massachusetts customers in 2000 through a subsidiary, New England Gas Company, that it formed after acquiring several local gas companies. It stopped serving Rhode Island customers in 2006.

As part of the transactions in 2000, Southern Union acquired a twelve-acre complex, once used as a gas manufacturing plant, on Tidewater Street in Pawtucket, Rhode Island. Most of the complex sat unused, but Southern Union used a few buildings for automated monitoring and used outdoor spaces to store construction supplies and waste.

The Tidewater property was not maintained and had fallen into disrepair. The perimeter fence was rusted, with gaps that were left unrepaired. There were no security cameras, and Southern Union had removed the single part-time security guard from the site by September 2004. Southern Union was aware that homeless people were staying in a tin shed on the property, and that the property was frequently vandalized.

In June 2001, Southern Union began removing outdated mercury-sealed gas regulators (MSRs) from customers' homes and replacing them with updated regulators. The old MSRs were taken to a brick building at the Tidewater facility. There, for about five months, an environmental firm removed the mercury from the regulators and shipped it to a

recycling facility, leaving the regulators to be cleaned and scrapped. Southern Union stopped removing MSRs as a matter of course in November 2001, and its arrangement with the environmental firm ended in December 2001. However, Southern Union continued to remove MSRs whenever they malfunctioned, bringing them to Tidewater, where they were "stored" in doubled plastic bags placed in plastic kiddie pools on the floor of the brick building.

Employees were also encouraged to bring any loose mercury they found in their departments to Tidewater, where it was placed in the same building as the gas regulators. The loose mercury was stored in the various containers in which it arrived, including a milk jug, a paint can, glass jars, and plastic containers. Southern Union kept the containers in a locked wooden cabinet that was not designed for mercury storage. The brick building was in poor condition and had suffered break-in attempts and vandalism. It had many broken windows and its walls were covered in graffiti. Neither the cabinet nor the building itself contained any warning notice that hazardous substances were inside.

Southern Union had no use for any of the mercury it accumulated. By July 2004, when a Southern Union employee catalogued the contents of the brick building, it held 165 MSRs and approximately 1.25 gallons, or more than 140 pounds, of loose mercury (two tablespoons of mercury weigh just under one pound). That cataloging did not lead the company to arrange for recycling, to secure the building, or to secure a storage permit from the state.

Southern Union was well aware that the mercury was piling up and that it was kept in unsafe conditions. The Environmental Services Manager for

its New England Gas Company division, who testified that he was concerned about the safety risk the mercury posed to the company's employees, drafted proposed Requests for Proposals (RFPs) in 2002, 2003, and 2004 to solicit bids to remove and dispose of or recycle the regulators "and associated wastes."

The 2002 draft was sent to Southern Union's Texas corporate headquarters for review by the Director of Environmental Services, where it died. Not only was the RFP not issued, but the New England Gas Company engineer who oversaw the environmental department became angry when he was repeatedly asked about it. The 2003 proposed RFP met the same fate, even though it specified the contents of a number of different containers of mercury. The draft, titled "Request for Proposals for Waste Segregation, Packaging, Transportation, and Disposal," sought a bid to "[r]emove liquid mercury from several small containers" and "[t]ransport and dispose (or recycle) of all *waste* generated" by this work (emphasis added). Nor did anything come of the 2004 proposed RFP, even though the environmental manager went outside his chain of command trying to get the RFP issued to vendors.

The safety risk posed by the conditions under which the mercury was stored was discussed at joint employee-management safety committee meetings in May, June, and September 2004. Indeed, the employee who brought a regulator in on September 20, 2004 was so concerned about the accumulating mercury that he raised the issue with his supervisor. No action was taken.

In late September 2004, youths from a nearby apartment complex broke into the brick building, broke open the wooden cabinet, found the mercury,

and, playing with it, spilled some of it in and around the building. They also took some of the mercury back to their apartment complex, where they spilled more on the ground, dipped cigarettes in it, and tossed some in the air. Mercury was tracked into the residences when people walked through it and was found in several homes.

Southern Union discovered the break-in and spills on October 19, roughly three weeks later, when a worker found pancake-sized puddles of mercury around the brick building. Southern Union immediately called in a contractor to begin cleaning up the spills at Tidewater and the apartment complex.

A Southern Union employee also left a voicemail message that day for Jim Ball, the Emergency Response Coordinator at the state Department of Environmental Management. However, Southern Union did not contact the Pawtucket Fire Department or the state Fire Marshal, the designated points of contact for a release of more than a pound of mercury. The Fire Department did not arrive at Tidewater until the next day, after having found out about the spill from the Department of Environmental Management. By that time, the contractor had already removed the remaining mercury from the building and begun to ship it offsite.

Altogether, the company spent more than $6 million remediating the two spill sites. All five buildings in the apartment complex were evacuated. Residents, 150 of them, were displaced for two months. Most were tested for mercury levels in their blood. While some had elevated levels, none met current standards for hazardous exposure.

II. *CHALLENGES TO THE CONVICTION*

In 2007, a federal grand jury returned a three-count indictment against Southern Union. The indictment charged Southern Union with two counts of storing hazardous waste without a permit in violation of RCRA. *See* 42 U.S.C. § 6928(d)(2)(A). Count One of the indictment covered the loose liquid mercury, and Count Three covered the mercury-embedded gas regulators. Count Two of the indictment charged Southern Union with failing to properly report a mercury release of more than one pound, a violation of the Emergency Planning and Community Right-to-Know Act.[1] *See* 42 U.S.C. §§ 11004, 11045(b)(4).

Southern Union's prime defense at trial was that the mercury was not a waste, but rather was a commercial chemical product that the company intended to recycle. Even if the mercury was not a commercial chemical product, the Company argued, it had not "knowingly stored a hazardous waste" because it believed the mercury was recyclable. After a nearly four-week trial, a jury convicted Southern Union on Count One only. *Southern Union I*, 643 F.Supp.2d at 207.

Just before trial, Southern Union filed a motion arguing that the federal government lacked authority to enforce Rhode Island's regulations governing small quantity generators, under which Southern Union was prosecuted, because they were "broader in scope" than the federal RCRA program and therefore not part of the federally approved and federally enforceable state program. The district court denied the

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[1] Fifty-five plaintiffs filed related civil litigation.

motion, and Southern Union renewed it after the jury verdict in a motion for a judgment of acquittal.[2]

The district court denied the motion for acquittal in a published opinion issued July 22, 2009, finding Southern Union's challenge untimely under 42 U.S.C. § 6976(b), which governs judicial review of the EPA's authorization of state hazardous waste programs. *Southern Union I*, 643 F.Supp.2d at 209-10. The court highlighted the statute's specific prohibition against judicial review of such authorizations in "criminal proceedings for enforcement." *Id.* (quoting 42 U.S.C. § 6976(b)). The court in the alternative rejected Southern Union's challenge on the merits, finding that the authorization was a valid, binding legislative rule that authorized federal enforcement. *Id.* at 210-13.

Southern Union challenges the district court's application of RCRA and the 2002 Rule and claims that the prosecution violated due process. We review legal and constitutional questions de novo. *United States v. Sampson*, 486 F.3d 13, 19 (1st Cir.2007). Southern Union does not challenge the district court's factual determinations pertinent to the issue. Both of Southern Union's claims of error fail.

A. *Legal Structure*

RCRA, 42 U.S.C. § 6901 *et seq.*, regulates the "treatment, storage, and disposal of solid and hazardous waste" in order to minimize the waste generated and the harm done by that waste. *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483, 116 S.Ct. 1251, 134

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[2] Southern Union also filed a Rule 33 motion for a new trial. The district court denied the motion, *United States v. Southern Union Co.*, 643 F.Supp.2d 201, 217 (D.R.I.2009) (*Southern Union I*), and Southern Union does not appeal the denial.

L.Ed.2d 121 (1996). It is a federal crime to knowingly store hazardous waste, such as mercury waste, "without a permit under this subchapter," that is, under 42 U.S.C. §§ 6921-6939f, inclusive. 42 U.S.C. § 6928(d)(2)(A); 40 C.F.R. § 261.33(f) tbl (listing mercury as hazardous waste). Within that subchapter, § 6926 directs the EPA to authorize states to enforce their own hazardous waste programs "in lieu of" the federal program, if the state programs are "equivalent to" and "consistent with" the baseline federal program. 42 U.S.C. § 6926(b).

The effect of the statute is that there is federal enforcement, including federal criminal enforcement, of state rules that are part of federally authorized state plans under RCRA. This court so held in *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 44 (1st Cir.1991). Southern Union does not contest this proposition. Rather, it argues that the Rhode Island regulations enforced here are not part of a federally authorized state plan.

Under § 6926, the EPA has promulgated regulations governing federal approval of state programs, which provide that states may adopt and enforce requirements that are "more stringent" or have a "greater scope of coverage" than the federal baseline program. 40 C.F.R. § 271.1(i). However, for state programs with "a greater scope of coverage," the "additional coverage" does not become part of the federally approved program. 40 C.F.R. § 271.1(i)(2). Southern Union argues that the Rhode Island regulations applicable here provide additional coverage.

Rhode Island has administered its own federally authorized hazardous waste program since 1986, and has secured federal approval of amendments from time to time. *See* 67 Fed.Reg. 51,765, 51,766 (Aug. 9,

2002). Pertinent here is the EPA's authorization of further amendments to the state program on August 9, 2002. *Id.* at 51,765. On that date, the EPA published an "Immediate final rule" (the "2002 Rule") in the Federal Register under which the authorization would automatically go into effect on October 8, 2002, unless the EPA received a comment in opposition to the authorization within thirty days. *Id.* at 51,765, 51,766.

The 2002 Rule explained that the major difference between the new Rhode Island program and the federal baseline program was that Rhode Island now regulated conditionally exempt small quantity generators (CESQGs) more stringently than did the federal regulations.[3] Under the federal baseline program, CESQGs are exempt from many requirements—including the permit requirement—that are imposed on generators of higher quantities of hazardous waste. 40 C.F.R. §§ 261.5(a)(2) (outlining limited regulation of CESQGs), 270.1(c) (generally requiring permits to store hazardous waste).

Relying on the federal conditional exemption, Southern Union says it was a CESQG and therefore not required to have a permit. But the 2002 Rule made two things clear. One was that under Rhode

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[3] The federal program categorizes hazardous waste generators by the amount of hazardous waste they produce monthly. A hazardous waste generator qualifies as a conditionally exempt small quantity generator (CESQG) for a given month if it produces less than 100 kilograms of hazardous waste in that month and has accumulated no more than 1000 kilograms on-site. 40 C.F.R. § 261.5(a), (g)(2). In addition to complying with these limits, CESQGs must comply with regulations governing the categorization, treatment, and disposal of hazardous wastes. *See* 40 C.F.R. §§ 261.5(g)(1), (3); 262.11.

Island law, Southern Union needed a permit. The second, tellingly, was that this tighter regulation was going to be federally enforced.[4]

Southern Union did not comment; in fact, the EPA received no comments from the public. Nor did Southern Union take any action to seek judicial review of the EPA's final determination.

B. *Southern Union's Challenge*

Southern Union argues that Rhode Island's regulation of CESQGs, under which it was prosecuted for storing loose mercury without a permit, cannot, merely by virtue of the 2002 Rule, be the basis for federal criminal prosecution. From this it argues that the district court erred in refusing to put the question of whether it was a CESQG under federal law to the jury. It argues that only the part of a state's hazardous waste program that is "required by federal law" becomes part of the state's federally authorized—and therefore federally enforceable—program. Southern Union has put the cart before the horse.

1. *Southern Union Is Precluded By 42 U.S.C. § 6976(b) from Attacking Federal Criminal Enforcement of the Federally Authorized State Rule*

In enacting RCRA, Congress clearly channeled and limited the mechanism for judicial review of EPA authorizations:

> Review of the Administrator's action (1) in issuing, denying, modifying, or revoking any

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[4] The Rule also made it clear that a different part of the regulation, not at issue here, would not be federally enforced, indicating that the EPA did not simply assume all additional state requirements were federally enforceable.

> permit under section 6925 of this title . . . or (2) in granting, denying, or withdrawing authorization or interim authorization under section 6926 of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such issuance, denial, modification, revocation, grant, or withdrawal, or after such date only if such application is based solely on grounds which arose after such ninetieth day. *Action of the Administrator with respect to which review could have been obtained under this subsection shall not be subject to judicial review in civil or criminal proceedings for enforcement.* Such review shall be in accordance with sections 701 through 706 of Title 5.

42 U.S.C. § 6976(b) (emphasis added).

Two of the statute's mechanisms are involved here. First, under § 6976(b), judicial review of the EPA Administrator's actions in granting authorization (or interim authorization) to state programs under RCRA may be had in the pertinent federal court of appeals within ninety days of issuance of the authorization. Such review is to be in accordance with the Administrative Procedure Act, 5 U.S.C. §§ 701-706. It is undisputed that Southern Union failed to challenge the 2002 Rule in this manner. Second, when review of the Administrator's actions could have been obtained under § 6976, the statute denies judicial

review of the Administrator's action in "civil or criminal proceedings for enforcement."[5]

This congressional channeling of the forum, method, and timing of judicial review and exclusion of collateral attacks is not unusual. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) has a similar provision, *see* 42 U.S.C. § 9613(a), as do several other environmental statutes, *see* 33 U.S.C. §§ 1369(b), 2717(a); 42 U.S.C. §§ 300j-7, 4915(a), 7607(b). Courts have upheld such channeling. *See, e.g., United States v. Walsh*, 8 F.3d 659, 664 (9th Cir.1993) ("[T]here is nothing to prevent Congress from providing a single national forum for the litigation of [asbestos removal] standards [under 42 U.S.C. § 7607(b)]."); *Chrysler Corp. v. EPA*, 600 F.2d 904, 912-14 (D.C.Cir.1979) (applying 42 U.S.C. § 4915). The CERCLA provision, to take one example, was enforced in a cost-recovery action to preclude the corporate defendant's collateral attack on a Superfund site listing. *See United States v. Asarco, Inc.*, 214 F.3d 1104, 1107 (9th Cir.2000).[6] Southern Union has not argued that § 6976(b) is itself unconstitutional.

The federal circuit courts construing § 6976(b) and the similar review provision in § 6976(a) have unanimously rejected later collateral attacks on the Administrator's decisions. *See Safe Food & Fertilizer v. EPA*, 350 F.3d 1263, 1267 (D.C.Cir.2003) (rejecting,

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[5] The extension of time for challenging actions of the Administrator on grounds that arise after the ninetieth day is not applicable here.

[6] Southern Union's argument about § 6976(b) is presented in its reply brief. Arguments initially made in a reply brief are usually deemed waived. *See United States v. Hall*, 557 F.3d 15, 20 n. 3 (1st Cir.2009). But we bypass any issue of waiver and resolve the preclusion issue on the merits.

under § 6976(a), an "impermissible 'back-door' challenge" to rulemaking); *Chem. Weapons Working Grp., Inc. v. U.S. Dep't of the Army*, 111 F.3d 1485, 1491-93 (10th Cir.1997); *Greenpeace, Inc. v. Waste Techs. Indus.*, 9 F.3d 1174, 1180-82 (6th Cir.1993); *Palumbo v. Waste Techs. Indus.*, 989 F.2d 156, 159-62 (4th Cir.1993).

In its reply brief, Southern Union argues that there is a distinction between a challenge to an authorization and "a challenge to the [federal] [g]overnment's authority to enforce Rhode Island's CESQG permit requirement." There is no such distinction. It is the Administrator's authorization in the 2002 Rule that is under attack. Once that authorization is given through the Administrator's findings under 40 C.F.R. Part 271, which provides the requirements for federal authorization of state programs, federal enforcement follows automatically as a matter of law. *MacDonald*, 933 F.2d at 44. As Judge Wilkinson noted in *Palumbo*, the defendant's position "[a]t bottom . . . is nothing more than a collateral attack on the prior . . . decisions of the federal EPA. The RCRA judicial review provision plainly forbids such an attack, in place of a direct appeal." *Palumbo*, 989 F.2d at 159.

We wish to be clear: whether or not Southern Union had filed an action within ninety days of October 8, 2002 challenging the 2002 Rule, we may not under § 6976 review a defense in a criminal proceeding that the EPA's action was legally in error.[7]

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[7] In its reply brief Southern Union attempts to argue that it could not have challenged the 2002 Rule within ninety days because there was no final agency action to challenge. That, it argues, is because the operative language was a mere "preamble." It then merges this into an attack on the merits of the regulation, arguing that it is not a "binding" or "enforceable"

Nonetheless, in an abundance of caution we go on to examine the legality of the EPA's actions and conclude in an alternate holding that those actions withstand challenge.

2. *Southern Union's Attack on the Legality of the Federal Authorization of Rhode Island's Regulation of CESQGs Fails*

Southern Union's arguments fall into several general categories. It argues (1) that the 2002 Rule is not a binding legislative rule on its face for several reasons; (2) that the agency erred in its interpretation of the requirements in 40 C.F.R. § 271.1(i), because the state rule provides a "greater scope of coverage" and so cannot be within federal enforcement authority; and (3) that the 2002 Rule is invalid because it is inconsistent with prior EPA practice and that inconsistency has not been adequately explained or justified.

First, Southern Union challenges the authority under which the 2002 Rule was promulgated and the legal force of the Rule's statement that Rhode Island's regulation of CESQGs is federally enforceable. Southern Union claims, without citing authority, that the "EPA delegated to the Regions only the responsibility to authorize state RCRA programs under Section 6926(b)," not "to determine or expand the breadth of federal enforcement authority." But the EPA has a statutory duty to approve state programs to the extent they meet the statutory and regulatory criteria. Southern Union does not explain how the EPA—including the regional administrators exercising their delegated authorization responsibilities—can

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determination by the Administrator. We address this argument below.

fulfill that duty without specifying which parts of a state's program fulfill the criteria, thereby becoming federally approved and enforceable.

Still pursuing its attack on the legal force of the 2002 Rule, Southern Union argues that the portion of the Rule that discusses federal enforceability is a mere unenforceable preamble. *Cf. Florida Power & Light Co. v. EPA*, 145 F.3d 1414, 1418-20 (D.C.Cir.1998) (describing preamble to a proposed rule as not a final action for purposes of 42 U.S.C. § 6976(a)). It argues that the 2002 Rule neither purports to be a binding rule nor can be one, since it was not simultaneously codified in the Code of Federal Regulations. *Cf. Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538-39 (D.C.Cir.1986) (characterizing publication in Federal Register as minimum threshold requirement for status as regulation, *id.* at 538, but stating "[t]he real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations," *id.* at 539).

As a threshold matter, Southern Union's preamble argument is factually wrong. Unlike the Federal Register notices in the cases Southern Union cites, the 2002 Rule was not divided into separate preamble and rule sections and did not portray *any* part of the notice as "preamble."[8] Southern Union mischaracterizes other salient features of the 2002 Rule as well.

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[8] *Compare Natural Res. Def. Council v. EPA*, 559 F.3d 561, 565 (D.C.Cir.2009) *with* 72 Fed.Reg. 13,560, 13,560, 13,580 (Mar. 2, 2007) (Federal Register notice at issue in *Natural Res. Def. Council); compare Florida Power & Light Co. v. EPA*, 145 F.3d 1414, 1414-18 (D.C.Cir.1998), *with* 59 Fed.Reg. 55,778, 55,778, 55,792 (Nov. 4, 1994) (Federal Register notice at issue in *Florida Power & Light*).

The EPA authorization expressly stated that the action the EPA was taking was an "[i]mmediate final rule," 67 Fed.Reg. at 51,765; that it was a "final authorization" under 42 U.S.C. § 6926, 67 Fed.Reg. at 51,765, 51,768; and that the rule would later be codified in the Code of Federal Regulations, *id.* at 51,768. Moreover, the EPA clearly treated the 2002 authorization as having binding legal force, promulgating it through formal notice-and-comment rulemaking, and stating in the rule itself that the rule represented final agency action.[9]

Second, Southern Union presents an argument construing the relevant federal regulation. It argues that since the baseline federal program does not require CESQGs to obtain hazardous waste storage permits, the United States cannot enforce state rules that do. We reject this strained interpretation of 40 C.F.R. § 271.1(i), which governs federal authorization of state hazardous waste programs. The provision reads as follows:

> (i) Except as provided in § 271.4, nothing in this subpart[10] precludes a State from:

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[9] In applying the similar review provision in § 6976(a), the D.C. Circuit examines three factors to determine whether the EPA has issued a "final regulation" under RCRA: (1) EPA's characterization of the action, (2) whether the action was published in the Federal Register or the Code of Federal Regulations, and (3) most importantly, whether the action has a binding effect on either private parties or the EPA. *E.g., Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 226-27 (D.C.Cir.2007); *Gen. Motors Corp. v. EPA*, 363 F.3d 442, 448 (D.C.Cir.2004) (stating third factor most important). We need not address whether this circuit would take a similar view.

[10] This subpart includes 40 C.F.R. §§ 271.1-271.27 inclusive, all of which sections specify requirements for federal authorization of state programs.

> (1) Adopting or enforcing requirements which are more stringent or more extensive than those required under this subpart;
>
> (2) Operating a program with a greater scope of coverage than that required under this subpart. Where an approved State program has a greater scope of coverage than required by Federal law, the additional coverage is not part of the Federally approved program.

On Southern Union's interpretation of the regulation, any state rule that is not "required" by the federal baseline program necessarily imposes "a greater scope of coverage," and so the district court erred when it held that "more stringent" requirements are federally approved while only greater-in-scope requirements are not. We reject Southern Union's interpretation because it vitiates the clear distinction between "more stringent" and "greater in scope," collapsing the two terms into one.

Beyond that, if there were any ambiguity, we would "afford [] 'considerable deference' to the agency's interpretation of regulations promulgated under [its statutory] authority." *Rhode Island Hosp. v. Leavitt*, 548 F.3d 29, 34 (1st Cir.2008); *see also Martex Farms, S.E. v. EPA*, 559 F.3d 29, 32 (1st Cir.2009). Here, where the agency has expressed that interpretation in a legislative rule promulgated through notice-and-comment rulemaking, the agency's interpretation is binding unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), or otherwise defective under the APA. *See Levesque v. Block*, 723 F.2d 175, 182 (1st Cir.1983); *see also Coal. for Common Sense in Gov't Procurement v. Sec'y of Veterans Affairs*, 464 F.3d 1306, 1317 (Fed.Cir.2006)

(stating that a substantive rule has the force and effect of law).

Southern Union offers no argument that the EPA's interpretation is arbitrary or capricious, or that the agency somehow exceeded its statutory authority. It argues only that its own reading is better on the plain language of the regulation. We do not agree about the reading and in any event this is not enough. The EPA's interpretation of 40 C.F.R. § 271.1(i) to permit federal enforcement of "more stringent" state regulations is a reasonable one based on the text and structure of the regulation.[11]

Southern Union argues in the alternative that even if "more stringent" requirements are federally authorized, a state's regulation of CESQGs is "additional coverage" rather than merely a "more stringent" requirement because it expands the universe of regulated entities to include entities that would not otherwise be covered by RCRA.

Southern Union's argument is based on its misreading of 40 C.F.R. § 261.5. This federal regulation clearly regulates CESQGs, governing how they categorize their waste, where they may store it, and how they may dispose of it. 40 C.F.R. § 261.5(c), (g). This is in addition to the eligibility requirements for categorization as a CESQG in a given month. 40 C.F.R. § 261.5(a), (g)(2). Further, because the eligibility requirements are based on the amount of hazardous waste generated or stored in a particular month, CESQG status is transient, so that some generators will be CESQGs only some of the time. It

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[11] Southern Union does not challenge the validity of 40 C.F.R. § 271.1(i) itself (nor could it, since such a challenge would be untimely under 42 U.S.C. § 6976(a)).

does not expand the universe of regulated entities to subject already-regulated entities to fuller regulation in Rhode Island.

Third, and finally, Southern Union strongly urges that the 2002 Rule is invalid because it is irrationally inconsistent with prior pronouncements of the EPA's position on the regulation of CESQGs and on which state regulations will receive federal authorization. Southern Union's argument relies primarily on various nonbinding EPA guidance documents stemming from the agency's interpretations, in the 1980s, that state regulation of CESQGs was not federally enforceable. However, these internal guidance documents have not been put forth as legally binding and were not promulgated through notice-and-comment rulemaking, and therefore cannot trump the agency's formal regulatory promulgations. *Cf. Christensen v. Harris Cnty.*, 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000).

Southern Union also points in passing to prior formal EPA authorizations of state programs—in 1992 as to California and in 2001 as to the District of Columbia—determining that state regulation of CESQGs was not then, in the EPA's view, federally enforceable. *See* 66 Fed.Reg. 46,961, 46,965 (Sept. 10, 2001) (District of Columbia); 57 Fed.Reg. 32,726, 32,729 (July 23, 1992) (California). Southern Union argues the 2002 EPA Rule authorizing Rhode Island's program cannot be binding on the regulated community because it is inconsistent with these prior determinations.

We briefly explain why the 2002 Rule is not subject to attack on grounds of irrational inconsistency with other EPA authorizations of state programs. The facts show that Southern Union overstates the sup-

posed conflict. Since 1999, with the sole exception of the District of Columbia in 2001, EPA has consistently characterized state regulation of CESQGs as federally enforceable. *See* 72 Fed.Reg. 12,568, 12,570 (Mar. 16, 2007) (Vermont); 71 Fed.Reg. 9727, 9732, 9733 (Feb. 27, 2006) (New Hampshire); 69 Fed.Reg. 57,842, 57,856 (Sept. 28, 2004) (Connecticut); 64 Fed.Reg. 48,099, 48,101 (Sept. 2, 1999) (Louisiana). The District of Columbia decision in 2001 demonstrates, at worst, an aberration, and the agency has maintained a consistent position ever since. In this vein, EPA has issued a proposed rule making California's CESQG regulations federally enforceable. 75 Fed.Reg. 60,398, 60,401-02 (Sept. 20, 2010).

Policy change over time is not irrational inconsistency. Agencies may change their policies provided substantive changes in an agency's position are accomplished by notice-and-comment rulemaking, *see Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100, 115 S.Ct. 1232, 131 L.Ed.2d 106 (1995); *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 34-35 (D.C.Cir.2005), and accompanied by "some indication that the shift is rational," *Citizens Awareness Network, Inc. v. U.S. Nuclear Regulatory Comm'n*, 59 F.3d 284, 291 (1st Cir.1995) (citing *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808, 93 S.Ct. 2367, 37 L.Ed.2d 350 (1973) (stating agency's rationale must be clear "so that the reviewing court may understand the basis of the agency's action.")). These conditions are met here. Each state program authorization has been promulgated through notice-and-comment rulemaking. And the change was clearly rational; the EPA's "reasoned basis" for deciding state CESQG regulations are federally enforceable is clearly discernible from the very text and structure of the regulation. *See Bowman Transp., Inc. v. Arkansas-*

Best Freight Sys., Inc., 419 U.S. 281, 285-86, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974).

C. Southern Union's Due Process Claim

There was no lack of due notice to Southern Union that its behavior could lead to criminal prosecution.

The law embodies two commonsense notions in the face of protestations of innocence by reason of ignorance. One is that those who keep dangerous materials on hand know their activity is regulated. *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 565, 91 S.Ct. 1697, 29 L.Ed.2d 178 (1971) ("[W]here . . . obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation."). The other is that those who manage companies in highly regulated industries are not unsophisticated. Southern Union is in the natural gas industry, which is highly regulated both federally and locally. It is part of its business to keep abreast of government regulation. *See United States v. Lachman*, 387 F.3d 42, 56-57 (1st Cir.2004) (stating that companies in highly regulated industries are presumed to be on notice of applicable regulatory regime).

Further, the company's activities put it in violation of state law. R.I. Gen. Laws § 23-19.1-18 (making violation of state hazardous waste rules a felony punishable by imprisonment, $25,000 fine for each day's violation, and remediation costs). Southern Union does not argue it lacked notice of that. Rather, it argues it lacked notice that it could be federally prosecuted for activity it acknowledges was a state crime. We have held in a parallel situation that

notice that conduct violates state law constitutes fair notice of a counterpart federal violation. *United States v. Gagnon*, 621 F.3d 30, 33 (1st Cir.2010).

In any event, the Environmental Services Manager for Southern Union's New England Gas Company subsidiary received a letter in July 2002 explaining that the EPA would soon authorize revisions to Rhode Island's hazardous waste program and inviting the company to comment. The company had actual notice of the publication of a Final Rule. The ensuing federal 2002 Rule was crystal clear on its face that the state standards would be federally enforced. It became effective twenty-three months before the event which led to the prosecution of Southern Union. There was no trap for the unwitting here. Obliviousness is not a defense.

Southern Union also claims that because in 1992 and 2001 the EPA declined federal enforcement of CESQG regulations in California and the District of Columbia, respectively, federal enforcement of Rhode Island's CESQG regulations is so irrational as to violate due process. As we have noted, the EPA has proposed federal enforcement in California, and all enforcement decisions since 1999, save for the aberration of the District of Columbia, have been consistent with the Rhode Island enforcement decision. Southern Union has failed to show meaningful inconsistency, much less irrational inconsistency. Our conclusion above that the EPA has over time engaged in a rational shift toward a policy of federal enforcement disposes of this due process argument as well.

III. *CHALLENGES TO THE FINE*

The statutory fine for knowing storage of hazardous waste without a permit is "not more than $50,000 for

each day of violation." 42 U.S.C. § 6928(d). The district court imposed a $6 million fine and a $12 million "community service obligation." Southern Union adequately preserved an objection to these penalties on the grounds that the $38.1 million maximum fine calculated in the pre-sentence report violated *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).[12]

Apprendi requires that "any fact" other than that of a prior conviction "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490, 120 S.Ct. 2348. Southern Union argued at sentencing that the court could not impose a fine greater than $50,000, the maximum fine for a one-day violation. That was because Southern Union presented evidence at trial from which the jury could have found that for at least some of the period of the indictment, it had treated the loose mercury as a recyclable resource rather than as waste. The jury, it notes, was not asked to determine the number of days of violation, but only "to determine whether . . . *at some point* in time the

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[12] The district court found Southern Union had waived the *Apprendi* argument by failing to raise the issue during discussions about the structure of the jury verdict form, and raising the issue for the first time in objecting to the presentence report. *United States v. Southern Union Co.*, No. 07-134, 2009 WL 2032097, at *2 (D.R.I. July 9, 2009) (*Southern Union II*). Southern Union disagrees that there was waiver, given that in *United States v. Pérez-Ruiz*, 353 F.3d 1, 14 (1st Cir.2003), we found that "[i]n order to preserve a claim of *Apprendi* error for appeal, it is enough that a defendant offer a timely objection at sentencing." *Id.* The prosecution did not seek the district court's waiver ruling and does not press it on appeal.

liquid mercury was discarded by being abandoned" (emphasis added).

The prosecution argued that the *Apprendi* rule against judicial factfinding does not apply in the context of criminal fines. The district court held that *Apprendi* does apply, but found it implicit in the jury verdict and the indictment on which the verdict form was based that Southern Union had violated RCRA for the full 762 days charged in the indictment. *United States v. Southern Union Co.*, No. 07-134, 2009 WL 2032097, at *3-4 (D.R.I. July 9, 2009) (*Southern Union II*). It then used that information to calculate the maximum fine of $38.1 million. *Id.* at *4. The indictment charged conduct "[f]rom on or about September 19, 2002 until on or about October 19, 2004," and the verdict form encompassed Southern Union's conduct "[a]s to Count 1 of the Indictment, on or about September 19, 2002 to October 19, 2004." From these, the court concluded that the jury had found beyond a reasonable doubt that Southern Union violated RCRA during the entire period from approximately September 19, 2002 until October 19, 2004. *Southern Union II*, 2009 WL 2032097, at *3.

On appeal, Southern Union makes two arguments challenging the fine. First, it argues that where the statute of conviction sets a maximum fine of $50,000 "for each day of violation," 42 U.S.C. § 6928(d), then the issue of the number of days of violation must be submitted to the jury under *Apprendi*. Second, it argues that the penalties imposed constituted an abuse of discretion. While we disagree with the district court on the *Apprendi* issue, we also reject Southern Union's arguments.

A. *Apprendi Does Not Apply to Criminal Fines*

We start with the *Apprendi* argument, which presents a pure issue of law, reviewed de novo. *United States v. González-Vélez*, 466 F.3d 27, 40 (1st Cir.2006). It is an open question in this circuit whether *Apprendi* applies to criminal fines, though we have assumed that criminal fines are subject to the rule of *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), a post-*Apprendi* case on the Federal Sentencing Guidelines. *United States v. Bevilacqua*, 447 F.3d 124, 127 (1st Cir.2006); *see also United States v. Uribe-Londoño*, 409 F.3d 1, 5 n. 5 (1st Cir.2005).

Southern Union argues that the question of whether *Apprendi* applies is resolved by the plain language of the Supreme Court's opinion in that case, which states that the rule covers "any fact that increases the *penalty* for a crime" beyond the statutory maximum. *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348 (emphasis added). If *Apprendi* applies only to facts increasing terms of incarceration, and not to criminal fines, Southern Union argues, the Court's use of the broad word "penalty" becomes superfluous, and corporations, which cannot be incarcerated, are left outside *Apprendi's* protection.

The Supreme Court extended the *Apprendi* rule to new contexts in several post-*Apprendi* decisions. *See Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (applying rule to statute authorizing death penalty upon judge's finding of aggravating factor); *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (applying rule to statute authorizing "exceptional sentence" upon judge's finding of aggravating factor); *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005)

(applying rule to mandatory Federal Sentencing Guidelines enhancements); *Cunningham v. California*, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007) (applying rule to scheme authorizing schedule of longer prison terms if judge finds aggravating circumstance). Under these decisions, a judge may not mete out any "punishment" for which the jury has not found all the necessary "facts." *Blakely*, 542 U.S. at 304, 124 S.Ct. 2531. This has been called a "bright-line rule." *Cunningham*, 549 U.S. at 288, 127 S.Ct. 856. These cases do not distinguish among types of "penalties" or "punishment," leaving the broad language unglossed. From this one might conclude that a fine is like all other penalties, or one could reach a different conclusion. What is clear is that none of these cases deals with the question of whether the imposition of a fine falls under the *Apprendi* rule.

The prosecution argues that both the reasoning and the express language in *Oregon v. Ice*, 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517 (2009), mean that *Apprendi* does not apply to criminal fines, which have historically been within the discretion of judges, and not assigned to juries for determination. In *Ice*, the Court upheld a state sentencing regime that allowed judges to find facts justifying the imposition of consecutive, rather than concurrent, sentences of incarceration. *Id.* at 720. The Court characterized its decisions under *Apprendi* as curtailing any "legislative attempt to 'remove from the [province of the] jury' the determination of facts that warrant punishment for a specific statutory offense." *Id.* at 718 (quoting *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348) (alteration in original). The Court, reasoning from historical practice, cautioned that "preservation of the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense" is the

"animating principle" in which the *Apprendi* rule must remain rooted. *Id.* at 717. The Court expressly considered the history at common law of the practice *Ice* challenged. Finding that at the time of the Founding, it was judges who chose whether to impose sentences concurrently or consecutively, and that therefore no traditional jury function had been curtailed by Oregon's scheme, the Court declined to extend the *Apprendi* rule to this determination.[13] *Id.* at 717-18. The logic and method of *Ice* alter any previous broad understanding of *Apprendi*.

The prosecution argues that we should follow not only the method of historical analysis endorsed by *Ice* but also the opinion's express language about criminal fines. The Court made an express statement in *Ice*, albeit in dicta, that it is inappropriate to extend *Apprendi* to criminal fines. Observing that many states permit judicial factfinding on matters "other than the length of incarceration," the Court explained that "[t]rial judges often find facts about the nature of the offense or the character of the defendant in determining, for example, the length of supervised release following service of a prison sentence; required attendance at drug rehabilitation programs or terms

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[13] The Court explained that its decision was also justified by states' sovereign interest in maintaining authority over their criminal justice systems and by the administrative difficulties the contrary rule, which could necessitate bifurcated or trifurcated trials, would place on state court systems. *Oregon v. Ice*, 555 U.S. 160, 129 S.Ct. 711, 718-19, 172 L.Ed.2d 517 (2009). The prosecution has provided a long list of state statutes that impose fines per day of violation, urging this court to consider the impact on state sovereignty that the application of *Apprendi* to fines could have on these statutes. Because we find ample reason not to extend the rule here, we need not decide the merits of this argument.

of community service; and *the imposition of statutorily prescribed fines* and orders of restitution."[14] *Id.* at 719. The Court warned that applying *Apprendi* to these types of determinations "surely would cut the rule loose from its moorings." *Id.*

We agree that we must give this language great weight. We do not discount the Supreme Court's language merely because it was used in dicta. We "are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when . . . a dictum is of recent vintage and not enfeebled by any subsequent statement." *Rossiter v. Potter*, 357 F.3d 26, 31 n. 3 (1st Cir.2004) (alteration in original) (quoting *McCoy v. MIT*, 950 F.2d 13, 19 (1st Cir.1991)) (internal quotation mark omitted).

Turning again to the method of reasoning the Court used in *Ice*, we agree with the prosecution that we must follow the logic of *Ice*'s reasoning, which further supports the conclusion that *Apprendi* does not apply to criminal fines. As the Supreme Court recently stated, "[a] holding . . . can extend through its logic beyond the specific facts of the particular

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[14] We have previously held that orders of restitution are not subject to the *Apprendi* rule. *See United States v. Milkiewicz*, 470 F.3d 390 (1st Cir.2006). There, we explained that the statutory scheme for restitution, under which the court determines the victim's losses by a preponderance of the evidence, *id.* at 403, does not trigger the principles underlying *Apprendi* because the jury's verdict of guilt automatically authorizes restitution in the full amount of the victim's losses, *id.* at 404. We reached this result despite noting that a "literal application of the Supreme Court's language might suggest" that the *Apprendi* rule does apply, *id.* at 403, indicating that even before *Ice* the Supreme Court's *Apprendi* line of cases tolerated nuanced application despite the cases' broad language.

case." *Los Angeles County v. Humphries*, — U.S. —, 131 S.Ct. 447, 453, 178 L.Ed.2d 460 (2010).

Applying *Ice's* reasoning and logic to the issue in this case, it is now highly relevant that, historically, judges assessed fines without input from the jury.[15] Judges had discretion to determine the amount of any fine imposed, and "[t]he range was apparently without limit except insofar as it was within the expectation on the part of the court that it would be paid." Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 Am. J. Legal Hist. 326, 350 (1982). This is in direct contrast with the Supreme Court's reasoning in the *Apprendi* context that the "English trial judge of the later eighteenth century had very little explicit discretion in sentencing." *Apprendi*, 530 U.S. at 479, 120 S.Ct. 2348 (quoting John H. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, in The Trial Jury in England, France, Germany 1700-1900, at 13, 36-37 (A. Schiappa ed., 1987)). Judicial discretion was limited in this context because the jury decided what level of crime the defendant had committed, which in turn largely determined the sentence. *Id.* at 479-80, 120 S.Ct. 2348.

Southern Union's main rejoinder is that historical practices do not speak to the specific issue here, the determination of the duration of an offense on which

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[15] Before incarceration became widely used, "the two main forms of noncapital punishment were whippings and fines, and in both cases, the judge could set the amount or even elect between the two, depending on the nature of the defendant and the crime." Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings about Apprendi*, 82 N.C. L.Rev. 621, 641 (2004).

a fine is determined.[16] Even assuming fines are similar to sentences of incarceration, this argument misses the point of the analogy and the flow of the logic used by the *Ice* majority. The historical record presented in *Ice* showed that at common law, judges chose within their unfettered discretion whether to impose consecutive or concurrent sentences, and consecutive sentences were the default rule. *Ice*, 129 S.Ct. at 717. The prosecution here presents strong evidence of historic practice that at common law, judges' discretion in imposing fines was largely unfettered. The Court in *Ice* specifically cautioned that it would be senseless to use *Apprendi* to nullify sentencing schemes in which legislatures have *curtailed* the discretion judges had at common law. *Id.* at 719.

Our view that *Ice* has effected a change in the application of the *Apprendi* rule to the issue in this case is directly supported by the dissent in *Ice*. The four dissenting Justices stated that the majority opinion had altered the method of analysis underlying *Apprendi* in at least five different ways. *Id.* at 721-22 (Scalia, J., dissenting). They protested that the majority had constructed formal limits narrowing the broad, "nonformalistic rule" originally set forth in *Apprendi*. *Id.* at 720. The dissent stated that the *Ice* majority had accepted arguments the Court had previously rejected under *Apprendi* about the relevance

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[16] Southern Union also argues that there is evidence that ten states allowed juries to determine fines at the turn of the twentieth century. Such evidence, however, is of little utility where the inquiry concerns the role of the jury at common law. *See Ice*, 129 S.Ct. at 717 ("Our application of *Apprendi's* rule must honor the 'longstanding common-law practice' in which the rule is rooted.") (quoting *Cunningham v. California*, 549 U.S. 270, 281, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007)).

of common-law sentencing practices to the constitutionality of modern legislative sentencing schemes. *Id.* at 720-22. The dissent, colorfully accusing the majority of giving life to arguments previously "dead and buried," insisted that the Court's opinion in *Ice* "gives cause to doubt whether the Court is willing to stand by" the *Apprendi* rule. *Id.* at 723.

Our holding is based on the Supreme Court's language in *Ice* that "[i]ntruding *Apprendi's* rule into" decisions such as "the imposition of statutorily prescribed fines . . . surely would cut the rule loose from its moorings." *Id.* at 719 (majority opinion). To the extent that excluding criminal fines from *Apprendi* requires a more restrained view of the rule's scope than did the Court's previous *Apprendi*-line decisions, it is the Supreme Court in *Ice* that has imposed the restraint. *See id.* ("Members of this Court have warned against 'wooden, unyielding insistence on expanding the *Apprendi* doctrine far beyond its necessary boundaries.'") (quoting *Cunningham*, 549 U.S. at 295, 127 S.Ct. 856 (Kennedy, J., dissenting)).[17]

In the interest of judicial economy and efficiency we reach an additional issue. We hold that if we are wrong and if *Apprendi* does apply to criminal fines, it

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[17] We recognize that two circuits, which could not or did not discuss *Ice*, have applied *Apprendi* to criminal fines. *See United States v. Pfaff*, 619 F.3d 172 (2d Cir.2010); *United States v. LaGrou Distribution Sys., Inc.*, 466 F.3d 585 (7th Cir.2006). In *LaGrou*, which was decided before the Supreme Court's decision in *Ice*, the Seventh Circuit simply quoted the rule in *Apprendi* and held that the fine imposed in that case violated the rule. *LaGrou*, 466 F.3d at 594. In *Pfaff*, the Second Circuit cited to *LaGrou* without adding analysis of its own, other than to distinguish criminal fines from restitution on the stated grounds that only criminal fines are subject to statutory maximums. *Pfaff*, 619 F.3d at 174-75.

would be necessary to remand for resentencing. The district court erred in holding, despite the absence of a special interrogatory, that the jury necessarily found beyond a reasonable doubt that Southern Union had violated RCRA during all or nearly all of the date range in the indictment. *Southern Union II*, 2009 WL 2032097, at *3. The court reasoned that the indictment's description of the date range—from "on or about September 19, 2002 to October 19, 2004"—was "listed on the verdict form and found by the jury beyond a reasonable doubt." *Id.* From this date range the court calculated a period of violation of 762 days, resulting in a statutory maximum fine of $38.1 million, reduced a bit at the margin due to the "on or about" language in the verdict form. *Id.*

The prosecution essentially concedes and we agree that if *Apprendi* did apply to criminal fines, the jury did not necessarily determine the number of days of violation. The jury did not need to find that Southern Union began to violate RCRA "on or about" September 19, 2002 in order to convict Southern Union on Count 1. As the court instructed the jury, the jury needed only to "determine . . . whether at *some point* in time the liquid mercury was discarded by being abandoned" and therefore ceased to be legally held for future recycling and began to be stored as waste (emphasis added). Southern Union produced evidence that at several points throughout the indictment period, and as late as the summer of 2004, Southern Union employees discussed a potential mercury recycling project. The district court could not conclude from the verdict form the number of days of violation the jury had necessarily found.

Where an error is constitutional in nature, "the government has the burden of proving beyond a

reasonable doubt that the error did not affect the defendant's substantial rights." *United States v. Sepúlveda-Contreras*, 466 F.3d 166, 171 (1st Cir.2006). *Apprendi* error is harmless "where the evidence overwhelmingly establishes" the facts necessary "to justify the statutory maximum under which the defendants were sentenced." *United States v. Soto-Beníquez*, 356 F.3d 1, 46 (1st Cir.2004). That is not this case. We reject the prosecution's suggestion that the evidence was so overwhelming that no reasonable jury could conclude other than that the mercury was treated as waste throughout the period in the indictment.

If, then, we are wrong about whether the *Apprendi* rule applies to criminal fines, the case would need to be remanded to the district court for resentencing. The district court would need to address several issues that we mention but do not resolve here.

First, it would need to address the prosecution's argument at sentencing that even if *Apprendi* applied, Southern Union could be assessed a $500,000 fine under the alternative fine statute. *See* 18 U.S.C. § 3571(c).

Second, it may need to clarify the nature of the financial penalties it imposed. At sentencing, after determining that the statute "yields a maximum fine . . . of $38.1 million," the district court characterized the $18 million in financial penalties it imposed as two separate pools of funds, including a "fine" of $6 million and a "community service obligation," listed in the court's judgment as a special condition of probation, of $12 million.[18] In describing

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[18] $1 million of the $12 million obligation is designated for the following recipients: $200,000 each for the Rhode Island

the community service obligation, the court did not use the term "restitution," but neither did the court specify that it was part of a total fine.

The prosecution argues that the district court should be "permitted to clarify the status of the $12 million" it assessed in community service obligations as "restitution." Restitution is exempt from *Apprendi* under our circuit law. *United States v. Milkiewicz*, 470 F.3d 390, 402-04 (1st Cir.2006).

Southern Union, in its opening brief, ignored the district court's treatment of the financial penalties as having two separate components, and described its obligations as a single $18 million penalty. In its reply brief, it argues that the district court cannot recharacterize the community service obligations as restitution because it did not invoke the statutory restitution procedure before sentencing. *See* 18 U.S.C. § 3664. If a remand were necessary, the district court may need to address these issues in the first instance and determine which arguments Southern Union has preserved.

B. *The Fine Imposed Was Reasonable*

We review the reasonableness of the sentence imposed, upholding the sentence unless the district court abused its discretion. *United States v. Carrasco-De-Jesús*, 589 F.3d 22, 26 (1st Cir.2009); *United States*

Chapter of the American Red Cross, the Rhode Island Environmental Response Fund, the Hasbro Children's Hospital in Providence, the state Distressed Communities Recreation and Acquisition Fund, and the Pawtucket Fire Department. The remaining $11 million is designated to endow a grantmaking fund, to be managed by the Rhode Island Foundation, in order to fund grants in environmental education, remediation, conservation, and children's health issues related to toxic waste.

v. Thurston, 544 F.3d 22, 24-25 (1st Cir.2008). First, we determine whether the district court considered the relevant statutory sentencing factors and adequately explained the sentence it chose.[19] *See United States v. Martin*, 520 F.3d 87, 92 (1st Cir.2008) (quoting *Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007)). Second, we consider whether the sentence is substantively reasonable under the totality of the circumstances, giving due deference to the district court's experience and familiarity with the facts of the case. *Id.*

The Sentencing Guidelines on fines do not apply here, and so in addition to the relevant RCRA provision, 42 U.S.C. § 6928(d), the district court was obliged to consider only the sentencing factors in 18 U.S.C. §§ 3553 and 3572. U.S.S.G. §§ 8C2.1 cmt. background, 8C2.10 (2009); *see also United States v. Ionia Mgmt. S.A.*, 555 F.3d 303, 310-11 (2d Cir.2009) (explaining review of fine imposed when Sentencing Guidelines do not apply). Even assuming arguendo that the $12 million community service obligation was a fine, the financial penalties imposed were within the discretion of the district court.

Southern Union argues that the district court misapplied the statutory sentencing factors, placing too much emphasis on factors likely to increase the fine, such as the company's profitability, and too little on mitigating factors, such as its prior history as a clean, responsible corporate citizen and its out-lays in remediating the damage from the mercury distribution. The prosecution urges us to review these claims only for plain error, because Southern Union failed

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[19] Southern Union does not challenge the district court's pertinent findings of fact.

to present them to the district court despite clear opportunity to do so after the court announced the sentence. *See United States v. Almenas*, 553 F.3d 27, 36 (1st Cir.2009) (applying plain error review); *United States v. Mangual-Garcia*, 505 F.3d 1, 15 (1st Cir. 2007) (same). In any event we hold there was no procedural error, let alone plain error, in the district court's methodical, detailed consideration of each sentencing factor.

Southern Union also claims the $18 million penalty was substantively unreasonable, arguing that it was grossly excessive in comparison to the penalties of $75,000-$250,000 imposed in what it describes as cases of more egregious RCRA violations. *See* 18 U.S.C. § 3553(a)(6) (requiring courts to "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"). But the district court made "an individualized assessment based on the facts presented," and "adequately explain[ed] the chosen sentence." *Gall*, 552 U.S. at 50, 128 S.Ct. 586.

The district court explained why the statutory factors justified the penalties, noting that Congress measured the seriousness of long-term RCRA violations by imposing a high, per-day statutory maximum fine; that Southern Union's willingness to put a densely-populated residential community, local public safety employees, and its own employees at risk by storing hazardous waste under deplorable conditions in their midst indicated great culpability; and that there was a need for a penalty substantial enough to attract the attention of large corporations, thereby achieving not only specific, but also general, deterrence. Further, the district court specifically acknowledged the need to avoid creating unwarranted

disparities, but explained that it had concluded that "sentencing in criminal environmental matters is a very individualistic task" in which case-to-case comparisons are difficult to make.[20] Reviewing the totality of the circumstances, we find no abuse of discretion in the sentence imposed by the district court.

IV.

In this case each side has been well represented by able counsel.

For the reasons stated above, we affirm Southern Union's conviction as well as the sentence and financial penalties imposed.

So ordered.

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[20] Based on the five cases Southern Union encourages us to consider, the court's conclusion was warranted. Four were resolved by plea agreements. The fifth, *United States v. Kelley Technical Coatings, Inc.*, 157 F.3d 432 (6th Cir.1998), upheld an RCRA conviction for which a $225,000 fine was imposed. *Id.* at 444. Kelley's sentence was not at issue on appeal, and the opinion lacks information necessary to any reasoned comparison—for instance, whether Kelley's manufacturing plants were in a populated area, or how large or profitable Kelley was. *See id.* at 435-36. Further, the Sixth Circuit affirmed the conviction of Kelley's vice president and his sentence to a fine and imprisonment, *id.* at 443-44—a substantial penalty imposing individual responsibility that is completely absent in Southern Union's case since, as the district court noted, there is no evidence of any individual shouldering any responsibility for the company's RCRA violation.

APPENDIX B

UNITED STATES DISTRICT COURT,
D. RHODE ISLAND

Cr. No. 07-134 S

UNITED STATES OF AMERICA

v.

SOUTHERN UNION COMPANY.

July 9, 2009

PRELIMINARY SENTENCING MEMORANDUM

WILLIAM E. SMITH, United States District Judge.

Defendant in this matter, Southern Union Company, has filed an objection to the pre-sentence report, prepared by the U.S. Office of Probation, which sets the maximum fine that may be imposed as a result of the Defendant's crime of conviction at $38.1 million, the equivalent of $50,000 per day for each day the Defendant illegally stored hazardous waste, liquid mercury, without a permit in violation of 42 U.S.C. § 6928(d)(2). In order to give the parties the ability to argue more meaningfully and effectively in both their written submissions and oral presentations at the upcoming sentencing hearing, the Court, after conferring with counsel, asked for briefs on this issue. For these same reasons the Court believes a ruling on Defendant's objection in advance of

sentencing is in order. For the reasons set forth below, Defendant's objection will be overruled.

I. *Background*

The Defendant, Southern Union Company, is a Delaware corporation based in Texas and primarily engaged in the business of transporting and distributing natural gas. The Defendant was convicted after a jury trial of knowingly storing hazardous waste, liquid mercury, from on or about September 19, 2002 to October 19, 2004. The penalty for this violation is a fine of not more than $50,000 for each day of violation. 42 U.S.C. § 6928(d).

The Defendant now argues that the jury's verdict is ambiguous with respect to the exact date range of the violation and that without a more exact finding by the jury on the date range of its violation the maximum penalty that the Court may legally impose is only $50,000 for one day of violation. The Defendant further contends that any factual finding clarifying the verdict would violate *Apprendi*, which requires that any fact (other than a prior conviction) that would raise the defendant's sentence beyond the prescribed statutory maximum must be proved beyond a reasonable doubt to a jury. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The Government contends that *Apprendi* is inapplicable to fines in general; the finding of the jury is sufficient to support the $38.1 million fine maximum and no *Apprendi*-violating judicial findings are required; and, finally, even if it does apply the so-called alternative fine statute would apply and set the maximum fine at $500,000. *See* 18 U.S.C. § 3571.

The analysis of Defendant's arguments begins with the charging document. The Grand Jury charged the Defendant in a three count indictment with crimes relating to the illegal storage of hazardous waste in the form of liquid mercury and mercury sealed gas regulators and the failure to provide emergency notice of the release of liquid mercury into the environment. The jury returned a guilty verdict on Count I—relating to the storage of the liquid mercury—but acquitted the Defendant on the two other counts. In pertinent part, Count I of the Indictment charged as follows:

> 29. From on or about September 19, 2002 until or on or about October 19, 2004, within the District of Rhode Island, Southern Union Company defendant herein, did knowingly store, and cause to be stored, hazardous wastes, namely, waste liquid mercury, on the premises of 91 Tidewater Street, Pawtucket, Rhode Island, without a permit issued pursuant to RCRA.
>
> All in violation of 42 U.S.C. § 6928(d)(2)(A) and 18 U.S.C. § 2.
>
> (*See* Indictment (Doc. 1).)

During the trial the Government offered and the Court admitted into evidence daily work logs kept by the Defendant's Environmental Services Manager, which specifically referenced the storage of ten pounds of liquid mercury at Defendant's Tidewater Street facility in Pawtucket, Rhode Island on September 19, 2002. (*See* Gov'ts Ex. 303; *see also* Trial Tr. Vol. 4, 110-112, Sept. 25, 2008 (Doc. 108); Trial Tr. Vol 5, 116-20, Sept. 29, 2008 (Doc. 109).) The jury also heard testimony that on October 19, 2004 one of the Defendant's employees discovered

that the liquid mercury the Defendant had been illegally storing had been spilled by vandals who had broken into the mercury storage building, and the cabinet containing the liquid mercury. (*See* Trial Tr. Vol 6, 22-25, Sept. 30, 2008 (Doc. 111).) Following a nearly four week trial, in its closing argument, the Government explained that September 19, 2002 was the earliest date the Government could establish with direct evidence that the Defendant was illegally storing liquid mercury. (*See* Trial Tr. Vol. 13, 40:21-25, 41:1-12, Oct. 14, 2008 (Doc. 119).) Thereafter, the jury convicted the Defendant on Count I of the Indictment relating to the storage of the liquid mercury. In its verdict, the jury specifically found, beyond a reasonable doubt, that:

> As to Count 1 of the Indictment, on or about September 19, 2002 to October 19, 2004, knowingly storing a hazardous waste, liquid mercury, without a permit, we the jury find the Defendant, Southern Union Company GUILTY.
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> (*See* Verdict Form (Doc. 98).)[1]

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[1] Defendant's objection is reminiscent of Captain Renault's exclamation in the classic movie "Casablanca" that "I'm shocked, shocked to find that gambling is going on in here!" *See* The Internet Movie Database at %ihttp://www.imdb.com/title/tt0034583/quotes. In similar fashion Defendant seems shocked that the fine in this case may be as high as $38.1 million. Yet, at the conclusion of the twelfth day of trial and the presentation of evidence, the Court instructed the parties that:

> I need you to come prepared to the charge conference with your suggestions as to the verdict form in this case and whether you feel there is a need for special interrogatories to the jury on some or all of the counts. We need to have a discussion about that as well.
>
> (Trial Tr. Vol. 12, 47: 6-11, Oct. 8, 2008 (Doc. 122).)

II. *Discussion*

The Sixth Amendment requires that "any fact that exposes a defendant to a greater potential sentence

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On October 9, 2008, the Court engaged counsel in an extensive charge conference at which time the verdict form was discussed.

While the initial conference discussion is off the record, the Court's notes reflect that one of the topics for discussion was "dates." The Court's recollection is that the Government and the Defendant took the position that the dates in the Indictment were sufficient for the jury to render a verdict. Per the Court's usual practice, the Defendant was allowed to state its objections to the jury charge and the verdict form after the conference. No objections were asserted by the Defendant to the proposed verdict form. To be absolutely sure, just before the jury began deliberations, the Court gave each party another opportunity to object to the verdict form, and the Defendant remained silent. (*See* Trial Tr. Vol. 13, 194:21-25, 195:1-5, Oct. 14, 2008 (Doc. 119).)

There can be little doubt that the Defendant, with its experienced and able counsel, knew at the time of the conference of the supposed ambiguity of which it now complains, but declined to seek clarification or more precision in the verdict form. Indeed, it is beyond dispute that counsel expressed satisfaction with using the Indictment's "on or about September 19, 2002" language in the verdict form. This hide the ball tactic is not without consequence. In the Court's view the Defendant's failure to respond to the Court's invitation for even greater specificity in the verdict form, its assent to the use of the Indictment language, and its failure to formally place an objection on the record is a clear waiver of its newly minted objection. *See United States v. Fisher*, 494 F.3d 5, 9 (1st Cir.2007); Fed.R.Crim.P. 30; *see generally Petsch-Schmid v. Boston Edison Co.*, 1997 WL 100904, *1 (1st Cir.1997) ("We have stated repeatedly that the failure to object before the jury retires to the charge or the verdict form constitutes a waiver."). In spite of this waiver, the Court will go on to address the substance of Defendant's objection, which clearly lacks merit. *See* Fed.R.Crim.P. 52(b) (indicating that Court should review for plain error).

must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." *Cunningham v. California*, 549 U.S. 270, 281, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007). However, "[a] sentencing court may make factual findings that result in an increase to a defendant's sentence as long as the sentence imposed is within the default statutory maximum." *United States v. Vasco*, 564 F.3d 12, 23 (1st Cir.2009) (citing *United States v. Perez-Ruiz*, 353 F.3d 1, 15 (1st Cir.2003)). The Supreme Court has defined "statutory maximum" as "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely v. Washington*, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (emphasis in original). "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow . . . the judge exceeds his proper authority." *Id.* at 303-04 (emphasis in original).

The Court rejects the notion that *Apprendi* does not apply to fines and does not believe, as the Government argues, that the Supreme Court recently indicated in *dicta* anything to the contrary. *See Oregon v. Ice*, — U.S. —, —, 129 S.Ct. 711, 719, 172 L.Ed.2d 517 (2009). The language the Government cites for the proposition that *Apprendi* does not apply to fines reads:

> Trial judges often find facts about the nature of the offense or the character of the defendant in determining, for example, the length of supervised release following service of a prison sen-

> tence; required attendance at drug rehabilitation programs or terms of community service; and the imposition of statutorily prescribed fines and orders of restitution. Intruding *Apprendi's* rule into these decisions on sentencing choices or accoutrements surely would cut the rule loose from its moorings.
>
> *Id.* (internal citation omitted).

The best that can be said about this passage is that *Apprendi* does not prevent a Court from engaging in judicial fact finding to determine the amount of a penalty *within* the prescribed statutory maximum range, which is something entirely different from finding a fact that determines the range.

With this guidance in mind, the actual issue for the Court to decide is what is the statutory maximum punishment for the Defendant's crime of conviction. The statute under which the Defendant was convicted, 42 U.S.C. § 6928, prescribes that any person convicted shall be subject to a fine that is calculated based on the number of days (or length) of the violation. *Id.* at § 6928(d). Thus, the statutory maximum penalty for violations of § 6928 can and will vary from case to case, and can only be determined in any particular case after a factual finding is made concerning the number of days a defendant violated the statute. Because the maximum statutory penalty is tied to the length of the violation, *Apprendi* and its progeny requires the jury, and not the Court, to find the dates needed to calculate the maximum fine. In practical terms what this means is that the maximum penalty must derive from the facts proven at trial to the jury and reflected by the verdict. So for example, if the verdict form inquired whether the Defendant violated § 6928 by storing liquid mercury

without a permit, with no date reference at all, and this Court proceeded to find beginning and end dates thereby increasing the penalty, it could be fairly said the judge was finding facts that increased the statutory maximum. This case, however, is not a situation where the jury gave no indication as to the dates of the Defendant's violation under § 6928.

In determining the statutory maximum in this case, the starting point is the date range contained in the jury's verdict and derived from the Indictment, that is "on or about September 19, 2002 to October 19, 2004." This was the range listed on the verdict form and found by the jury beyond a reasonable doubt. The Defendant's argument that the Court may only impose a fine of $50,000 because the jury did not report a finding as to the precise first date or last date when Southern Union violated RCRA ignores both the content and context of the verdict all together. From the verdict form, it is clear that the jury conclusively found beyond a reasonable doubt that the Defendant's conduct ended on October 19, 2004 and that it began "on or about" September 19, 2002. No other conclusion is logical or possible.

Strictly based on the dates listed in the verdict form the maximum length of the violation is 762 days, which when multiplied by $50,000 allows for a maximum fine of $38.1 million. But that is not the end of the analysis of course, because the Indictment and the verdict form use the standard term "on or about" preceding the earlier date, September 19, 2002. But while this common phrase may put a little play in the joints, it does not cut the legs out altogether.

In its instructions to the jury, the Court stated that the meaning of "on or about" is a date "reasonably

near" the date alleged and the Defendant made no objection to that instruction. (*See* Trial Tr. Vol. 13, 14-33, 148:10-16 (Doc. 119).) Therefore, it defies reason to suggest the Defendant's illegal storage of liquid mercury began on any other date than a date reasonably near September 19, 2002. From this, it follows that the maximum statutory penalty that may be imposed based solely on the facts reflected in the jury verdict is a fine that is "reasonably near" $38.1 million.

Within this range of reasonably near $38.1 million, the Court is free, as the holding of *Ice* makes clear, to find facts that pinpoint the maximum fine, or establish a sentence that is at or below the maximum. At trial, the Government introduced direct evidence (work logs and testimony) that indicated that mercury was stored at least as early as September 19, 2002. Had there not been evidence of this date, no doubt the Defendant would have moved for dismissal of the Indictment on this ground and/or insisted on a verdict form that conformed to the evidence. Moreover, if such evidence were lacking the jury could have (and likely would have) returned a verdict of not guilty (as it did on Counts II & III). But the evidence introduced was clear and essentially irrefutable. From this it is easily found that the precise date for establishing the maximum penalty is in fact September 19, 2002. So long as the Court determines that the statutory maximum is at or below the amount that derives from the verdict itself—which is $38.1 million—there can be no *Apprendi* violation.

III. *Conclusion*

For the foregoing reasons, the Defendant's objection to the pre-sentence report on the maximum allowable fine that may be imposed is OVERRULED.

The Court will set the maximum fine that may be imposed against the Defendant at $38.1 million as stated in the pre-sentence report.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 09-2403

UNITED STATES

Appellee

v.

SOUTHERN UNION COMPANY

Defendant - Appellant

Before

Lynch, *Chief Judge*,
Torruella, Selya, Boudin, Lipez,
Howard and Thompson,
Circuit Judges.

Entered: February 17, 2011

ORDER OF COURT

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered

that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

/s/ Margaret Carter, Clerk

OPPOSITION BRIEF

No. 11-94

In the Supreme Court of the United States

SOUTHERN UNION COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Petitioner was convicted under a statute that authorizes "a fine of not more than $50,000 for each day of violation." 42 U.S.C. 6928(d). The question presented is whether the Sixth Amendment, as interpreted in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), required that the jury rather than the trial court determine the number of "day[s] of violation" before the court could impose a fine greater than $50,000 pursuant to Section 6928(d).

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In the Supreme Court of the United States

No. 11-94

SOUTHERN UNION COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 630 F.3d 17. The preliminary sentencing memorandum of the district court (Pet. App. 39a-48a) is reported at 2009 WL 2032097. A subsequent opinion of the district court, denying petitioner's motion for a judgment of acquittal or for a new trial, is reported at 643 F. Supp. 2d 201.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 2010. A petition for rehearing was denied on February 17, 2011 (Pet. App. 49a-50a). On April 12, 2011, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including June 17, 2011. On June 9, 2011, Justice Breyer further

extended the time to July 17, 2011, and the petition for a writ of certiorari was filed on July 15, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the District of Rhode Island, petitioner was convicted of illegally storing a hazardous waste (mercury) without a permit, in violation of 42 U.S.C. 6928(d)(2)(A). The district court imposed a fine of $6 million and a term of probation. The court of appeals affirmed. Pet. App. 1a-38a.

1. Under the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*, it is a felony to knowingly store a "hazardous waste" without a permit. 42 U.S.C. 6928(d)(2)(A). Violation of that provision is punishable by "a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed * * * five years." 42 U.S.C. 6928(d). If the defendant is an organization and the offense is a felony, the court may impose a fine of "not more than $500,000," if that amount is greater than "the amount specified in the law setting forth the offense." 18 U.S.C. 3571(c).

RCRA defines "hazardous waste" as any "solid waste" that threatens substantial danger to human life or health or to the environment. 42 U.S.C. 6903(5). "Solid waste," in turn, includes "discarded material." 42 U.S.C. 6903(27). A material is considered discarded if it is stored or accumulated before, or in lieu of, disposal. 40 C.F.R. 261.2(b)(3). Discarded material also includes "spent materials," even if they are "recycled—or accumulated, stored, or treated before recycling—as specified" in the applicable regulations. 40 C.F.R. 261.2(a)(2)(i)(B) and (c) & tbl.1; see also *Howmet Corp.* v. *EPA*, 614 F.3d 544, 547-548 (D.C. Cir. 2010). A spent

material is "any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing." 40 C.F.R. 261.1(c)(1). In sum, any hazardous waste (including certain spent materials and materials stored before, or in lieu of, disposal) requires a storage permit under RCRA.

Mercury is a highly toxic heavy metal that can poison and kill those exposed to it. Pet. App. 2a. When mercury is discarded or intended to be discarded, it is a hazardous waste under RCRA. See 40 C.F.R. 261.33(f) tbl.

2. In June 2001, petitioner, a natural-gas distribution company, began removing outdated mercury-sealed gas regulators from customers' homes and replacing them with mercury-free regulators. Pet. App. 3a. Petitioner at first hired an environmental firm to remove the mercury from the regulators and ship it to a recycling facility. Petitioner later discontinued that arrangement but nevertheless continued collecting malfunctioning, mercury-filled regulators and any loose liquid mercury that its employees found. *Id.* at 3a-4a. In 2001, a company official described the accumulated material as "spent" mercury and discussed keeping it in a "HAZWaste storage area." C.A. App. 1510, 1517, 2834-2835. As admitted by several company officials, "[petitioner] had no use for any of the mercury it accumulated." Pet. App. 4a; C.A. App. 903, 966, 1519. Petitioner's employees were thus instructed that whenever they found mercury, they were to "get rid of it." C.A. App. 1047, 1071, 2085.

Petitioner brought the mercury-filled regulators and liquid mercury to a brick building that it owned in Pawtucket, Rhode Island. Pet. App. 3a. Company officials admitted that the building was used for "[s]torage

of junk," and the evidence showed that the building contained broken tools and furniture, discarded equipment, and empty cans and drums. C.A. App. 569; see *id.* at 445-450, 574-575, 1520, 2805-2807, 2812, 2827. The company stored the mercury-filled regulators in kiddie pools on the floor of the building and the liquid mercury "in various containers inside a wooden cabinet, including a milk jug, a paint can, glass jars, and plastic containers." Pet. App. 4a. By July 2004, the brick building held 165 regulators and 1.25 gallons, or more than 140 pounds, of liquid mercury. *Ibid.*

Petitioner posted no signs warning of hazardous substances. Even though the brick building had suffered break-in attempts and petitioner knew that the property was frequently vandalized and occupied by homeless people, petitioner removed the only security guard from the property in 2004. Pet. App. 3a-4a; *United States* v. *Southern Union Co.*, 643 F. Supp. 2d 201, 206 (D.R.I. 2009), aff'd, 630 F.3d 17 (1st Cir. 2010); Gov't C.A. Br. 5. Petitioner's environmental services manager repeatedly asked the company to dispose of the "waste" in 2002, 2003, and 2004, but the company took no action. Pet. App. 4a-5a.

In September 2004, local youths broke into the brick building, found the liquid mercury, and spilled it in and around the building and back at their apartment complex. Other residents of the complex inadvertently tracked it into their residences. Petitioner did not discover the release until weeks later, on October 19, 2004. All five buildings in the apartment complex had to be evacuated, and the residents were displaced for two months during cleanup. Pet. App. 5a-6a.

3. A grand jury in the District of Rhode Island returned an indictment charging petitioner with illegally

storing mercury without a permit "[f]rom on or about September 19, 2002 until on or about October 19, 2004," a period of 762 days. Pet. App. 41a.

The district court instructed the jury that the "proof need not establish with certainty the exact date of the alleged offense," but rather that the "offense was committed on a date reasonably near the date alleged." C.A. App. 2652. The verdict form returned by the jury read as follows:

> As to Count 1 of the indictment, on or about September 19, 2002 to October 19, 2004, knowingly storing a hazardous waste, liquid mercury, without a permit, we the jury find the Defendant, Southern Union Company GUILTY.

Pet. App. 42a.

The presentence report (PSR) concluded that the maximum fine was $38.1 million, or $50,000 per day multiplied by 762 days. Pet. App. 39a. Petitioner objected to the PSR based on this Court's decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). Pet. App. 40a. In *Apprendi*, this Court held that a sentence of imprisonment had been imposed in violation of the Constitution because the court, not the jury, had made the factual finding that was necessary to impose a sentence above the statutory maximum that would apply without the factual finding. Petitioner argued that *Apprendi*'s holding should be extended to criminal fines and that, because the jury did not find the specific dates on which its violation occurred, the maximum fine therefore was $50,000—the maximum for one day of violation.

The district court agreed that the Sixth Amendment, as interpreted in *Apprendi*, requires the jury to find any fact necessary to increase the statutory maximum fine.

Pet. App. 44a-45a. The court concluded, however, that the jury *had* found that petitioner violated RCRA for the full 762-day period alleged in the indictment. *Id.* at 46a-47a. From the indictment, the jury instructions, and the verdict form, the court discerned "clear and essentially irrefutable" evidence that the mercury was stored as early as September 19, 2002. *Id.* at 47a. The district court thus concluded that the maximum fine was $38.1 million. *Id.* at 48a.

The district court imposed a fine of $6 million. Separately, as a special condition of probation, the court required petitioner to perform "community service" by paying a total of $1 million to various community organizations and $11 million to endow a fund for issuing environmental grants. Pet. App. 34a & n.18.

4. The court of appeals affirmed. Pet. App. 1a-38a.

a. As relevant here, the court of appeals held that the Sixth Amendment permits a trial court, rather than the jury, to make the findings necessary to impose a criminal fine. The court reached that conclusion based on the "reasoning and logic" of this Court's decision in *Oregon* v. *Ice*, 555 U.S. 160 (2009). Pet. App. 30a.

In *Ice*, this Court held that the *Apprendi* rule does not govern certain factual findings by trial courts that increase the length of a defendant's incarceration. Ice was convicted of multiple offenses in a State that required by statute that the sentences be served concurrently, *unless* the trial court made a particular finding, in which case the sentences could be served consecutively. Ice contended that, under *Apprendi*, such a finding increased his punishment and must be made by the jury. This Court rejected that contention and held that the "decision to impose sentences consecutively is not within the jury function that 'extends down centuries

into the common law.'" *Ice*, 555 U.S. at 168 (quoting *Apprendi*, 530 U.S. at 477). Rather, that decision had consistently been made by courts, and the Court rejected any interpretation of the Sixth Amendment that would strip courts of that traditional function. *Ibid.*

Furthermore, the Court warned against "wooden, unyielding insistence on expanding the *Apprendi* doctrine far beyond its necessary boundaries." *Ice*, 555 U.S. at 172 (citation omitted). The Court noted that the interpretation of the Sixth Amendment that Ice advanced would threaten to invalidate many other judicial sentencing determinations, such as "the length of supervised release following service of a prison sentence; required attendance at drug rehabilitation programs or terms of community service; and the imposition of statutorily prescribed fines and orders of restitution." *Id.* at 171. "Intruding *Apprendi*'s rule into these decisions on sentencing choices or accoutrements," the Court stated, "surely would cut the rule loose from its moorings." *Id.* at 171-172.

In this case, the court of appeals followed this Court's analysis in *Ice*. The court of appeals first gave weight to the Court's "express statement in *Ice*, albeit in dicta, that it is inappropriate to extend *Apprendi* to criminal fines." Pet. App. 28a. The court then applied the "method of reasoning" that the Court used in *Ice*, *id.* at 29a, and found it "highly relevant that, historically, judges assessed fines without input from the jury." *Id.* at 30a. At the time of the Founding, the court observed, judges enjoyed considerably greater discretion to select the amount of a fine than they did in other aspects of sentencing. *Ibid.* The court concluded that in this case, as in *Ice*, the form of judicial factfinding at issue does not usurp any traditional jury function. The court of

appeals also pointed out that the dissenters in *Ice* advanced a broader reading of *Apprendi*, one that a majority of this Court rejected. *Id.* at 31a-32a. The court of appeals thus held that here, as the Court stated in *Ice*, "'[i]ntruding *Apprendi*'s rule into' decisions such as 'the imposition of statutorily prescribed fines . . . surely would cut the rule loose from its moorings.'" *Id.* at 32a (alteration in original) (quoting *Ice*, 555 U.S. at 171-172).

b. The court decided "[i]n the interest of judicial economy" to address whether, if a fine may violate the Sixth Amendment under *Apprendi*, any such error was harmless in this case. Pet. App. 32a. The court of appeals concluded that, if error occurred, the error was not harmless. *Id.* at 33a. According to the court, the government had not shown beyond a reasonable doubt "the facts necessary 'to justify the statutory maximum'" that the district court had calculated, *i.e.*, that petitioner treated the mercury as waste "throughout the period in the indictment." *Id.* at 34a (quoting *United States* v. *Soto-Beníquez*, 356 F.3d 1, 46 (1st Cir.), cert. denied, 541 U.S. 1074 (2004)).

The court of appeals noted that two matters would remain open if remand were required: whether petitioner could be fined up to $500,000 under 18 U.S.C. 3571(c), see p. 2, *supra*, and whether the $12 million "community service obligation" was properly considered not to be a fine at all, but restitution (which, under the court of appeals' precedent, is a civil remedy that does not implicate *Apprendi*). Pet. App. 34a-35a.

ARGUMENT

Petitioner contends (Pet. 11-17) that the Court should grant review to address a circuit conflict on whether *Apprendi* applies to criminal fines. The court

of appeals correctly applied *Ice*'s analysis in rejecting the extension of *Apprendi* to fines, and no other court of appeals has considered that question in light of this Court's decision in *Ice*. This case therefore does not present any circuit conflict that warrants this Court's review at this time. In addition, this case is a poor vehicle for addressing the question presented, because under a correct harmless-error analysis, any *Apprendi* error was harmless beyond a reasonable doubt. Further review is not warranted.

1. a. In *Ice*, this Court explained that, to establish a Sixth Amendment right to a jury determination, the defendant must do more than merely show that the applicable statutory law creates an "'entitlement' to predicate findings." 555 U.S. at 170. The holding of the *Apprendi* cases cannot be "wooden[ly]" applied to matters beyond "the central sphere of [those cases'] concern," namely, the historic function of the jury. *Id.* at 172 (citation omitted). The Court thus looked to historical practice and to the nature of modern sentencing legislation before concluding that some "statutory protections" that benefit the defendant by constraining judicial discretion do not invade the jury's constitutional role and, accordingly, do not warrant the application of *Apprendi*. *Id.* at 169; see *id.* at 168-172.

In this case, petitioner similarly seeks to expand the Sixth Amendment requirement of jury factfinding into a new context. This Court has never taken up "the question of whether the imposition of a fine falls under the *Apprendi* rule." Pet. App. 27a. The court of appeals in this case is the first appellate decision to apply the *Ice* analysis to answer that question. No other federal court

of appeals has done so; nor has any state supreme court.[1]

Of the cases that petitioner cites, only one postdates *Ice*. See *United States* v. *Pfaff*, 619 F.3d 172 (2d Cir. 2010) (per curiam), cert. denied, 131 S. Ct. 3059, and 131 S. Ct. 3060 (2011). That decision did not apply the analysis in *Ice*; the government's brief in *Pfaff* did not raise that argument or cite *Ice*. See *id.* at 174-175; Gov't C.A. Br. at 208-211, *Pfaff*, *supra* (No. 09-1702). The relevance of *Ice* should therefore be regarded as an open question in the Second Circuit. Furthermore, answering that question should lead to a different outcome. The *Pfaff* panel conducted no historical inquiry; rather, it reasoned only that because the applicable statute required a factual finding (pecuniary loss) before the court could fine the defendant a particular amount, that finding must be made by the jury. 619 F.3d at 174-175. *Ice*, however, squarely rejected the notion that *every* statutory "'entitlement' to predicate findings" gives rise to a constitutional entitlement to have the jury make those findings. 555 U.S. at 170.

Petitioner's other two cases—only one of which set circuit precedent—were decided before *Ice*. See *United States* v. *LaGrou Distrib. Sys., Inc.*, 466 F.3d 585, 594 (7th Cir. 2006); *United States* v. *Yang*, 144 Fed. Appx.

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[1] In fact, as petitioner's amici concede (at 9-10), some state supreme courts have concluded (in distinct contexts) that this Court's decision in *Ice* sets out the analysis to follow in resolving questions concerning extensions of *Apprendi*. See *State* v. *Andrews*, 329 S.W.3d 369, 373-374 (Mo. 2010) (en banc), cert. denied, 131 S. Ct. 3070 (2011); *State* v. *Rudy B.*, 243 P.3d 726, 734 (N.M. 2010), cert. denied, 131 S. Ct. 2098 (2011); *People* v. *Nguyen*, 209 P.3d 946, 959 (Cal. 2009), cert. denied, 130 S. Ct. 2091 (2010). No court of appeals or state supreme court has read *Ice* as petitioner (Pet. 19-20) and its amici (Br. 8) do, *i.e.*, as confined to the context of multiple-count sentencing.

521, 524 (6th Cir. 2005) (reversing a fine based on *Apprendi* error without analyzing whether *Apprendi* applies to criminal fines). The Seventh Circuit's decision in *LaGrou*, which the Second Circuit cited in *Pfaff* (see 619 F.3d at 175), is inconsistent with *Ice* for the same reason that *Pfaff* is: it rested on the notion that because the applicable statute required a factual finding (pecuniary loss) before the court could fine the defendant a particular amount, that finding must necessarily be made by the jury.[2] Because *Ice* is intervening authority, the Seventh Circuit is likely to address the question afresh and to apply *Ice*'s holding and analysis rather than to view the matter as foreclosed by *LaGrou*. Cf., *e.g.*, *United States* v. *Nance*, 236 F.3d 820, 822 n.1 (7th Cir. 2000), cert. denied, 534 U.S. 832 (2001).

Thus, contrary to petitioner's contention (Pet. 17), petitioner would not have faced "a fundamentally different legal regime for the imposition of criminal fines" in other circuits. Rather, this Court refined the *Apprendi* analysis in *Ice*, and both federal and state courts have only begun to apply that refinement in the context of criminal fines. At present, this Court's review is not warranted.

b. Petitioner suggests (Pet. 26-28) that the question presented is sufficiently important that this Court should review it even before a genuine conflict develops in the federal and state courts where this question may arise. Petitioner's contentions lack merit.

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[2] Although the government conceded that point in *LaGrou*, that concession came well before this Court's decision in *Ice*. Gov't C.A. Br. at 33-34, *LaGrou*, *supra* (No. 05-3361). See also Chamber Amici Br. 10 (noting that the government conceded the point in other settings before *Ice*).

Citing statistics about the total number of defendants sentenced to pay fines, petitioner suggests (Pet. 26-27) that the question presented would affect a significant number of cases. Petitioner's statistics do not bear out that assertion. Because the Sixth Amendment permits sentences to be enhanced based on facts the defendant admits in a guilty plea colloquy, see, *e.g.*, *Blakely* v. *Washington*, 542 U.S. 296, 303 (2004), the judge-versus-jury question presented here has, at most, limited relevance in guilty-plea cases. And many cases that result in fines involve guilty pleas. Indeed, petitioner emphasizes (Pet. 26-27) that most convictions of organizational defendants result in a fine. But the same statistics show that nearly all organizational defendants (93.8%) are convicted pursuant to a guilty plea. See U.S. Sentencing Comm'n, *2010 Sourcebook of Federal Sentencing Statistics* tbl.53 (2011), http://www.ussc.gov/Data_and_Statistics/Annual_Report_and_Sourcebooks/2010/Table53.pdf. Only six corporate defendants (4.1%) were convicted and fined after a trial in 2010. *Ibid.* Petitioner's principal example—a case involving a fine greater than $1 billion—likewise involves a guilty-plea conviction.[3] See also Pet. App. 38a n.20 (four out of five cases that petitioner identified as similar to this one for sentencing purposes "were resolved by plea agreements").

As petitioner notes (Pet. 27), a substantial number of federal and state statutes do calibrate criminal fines based on factual findings, such as the days-of-violation finding here. But since this Court decided *Apprendi*,

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[3] See Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *Justice Department Announces Largest Health Care Fraud Settlement in Its History* (Sept. 2, 2009), http://www.justice.gov/opa/pr/2009/September/09-civ-900.html.

relatively few cases have arisen in the lower federal or state courts in which the parties disputed the applicability of *Apprendi*'s holding to fines, and even fewer cases have required the courts to resolve such a dispute. See, *e.g.*, *People* v. *Kozlowski*, 898 N.E.2d 891, 908-909 (N.Y. 2008) (reserving the question because any *Apprendi* violation was harmless), cert. denied, 129 S. Ct. 2775 (2009). And as discussed above, the court below is the first federal appellate or state supreme court to confront the issue since *Ice*. The question presented does not recur with sufficient frequency to justify plenary review in the absence of a conflict.

2. The court of appeals correctly heeded this Court's admonition against "expanding the *Apprendi* doctrine far beyond its necessary boundaries." *Ice*, 555 U.S. at 172 (citation omitted). As this Court observed in *Ice*:

> States currently permit judges to make a variety of sentencing determinations other than the length of incarceration. Trial judges often find facts about the nature of the offense or the character of the defendant in determining, for example, * * * *the imposition of statutorily prescribed fines* and orders of restitution. Intruding *Apprendi*'s rule into these decisions on sentencing choices or accoutrements surely would cut the rule loose from its moorings.

Id. at 171-172 (citation omitted; emphasis added).

Ice, of course, involved consecutive sentencing, not fines, but its reasoning is nonetheless critical here. First, *Ice* establishes that the statutory "'entitlement' to predicate findings," such as those used in calculating a fine under RCRA, does not create a constitutional entitlement to have the jury make those findings. 555 U.S. at 170. Second, a historical analysis is necessary before

extending *Apprendi*. The Sixth Amendment is concerned with "legislative encroachment on the jury's traditional domain." *Id.* at 168 (citing *Apprendi*, 530 U.S. at 497). Accordingly, in determining whether the jury must find a particular fact, the Court considers "whether the finding of [that] fact was understood as within 'the domain of the jury . . . by those who framed the Bill of Rights.'" *Ibid.* (quoting *Harris* v. *United States*, 536 U.S. 545, 557 (2002) (plurality opinion)); see *id.* at 168-170.

At common law, the jury did not find facts governing the imposition of criminal fines, which were regularly imposed in misdemeanor cases. Instead, common-law judges had unfettered discretion to set the amount of criminal fines, subject only to the limitations that they "be proportionate to the offense, and, by the 17th century, that [they] not be 'cruel or unusual.'" *Apprendi*, 530 U.S. at 480 n.7 (citing J.H. Baker, *Introduction to English Legal History* 584 (3d ed. 1990)); see Pet. App. 30a-31a; see also John Jervis, *Archibold's Pleading, Evidence & Practice in Criminal Cases* 246 (26th ed. 1922) ("There is no general statutory limit to the amount of such fine, except the provisions of Magna Charta, and the Bill of Rights, against excessive and unreasonable fines and assessments.") (citation omitted). Likewise, in colonial America, the range of a criminal fine "was apparently without limit except insofar as it was within the expectation on the part of the court that it would be paid." Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 Am. J. Legal Hist. 326, 350 (1982). Thus, just as there was "no encroachment * * * by the judge upon facts historically found by the jury" in *Ice*, 555 U.S. at 169, there is no encroachment, and thus no *Apprendi* violation, where a judge finds

facts necessary to set the amount of a criminal fine. Petitioner contends (Pet. 23-24) that the jury-trial right applies here even though the jury played no part in setting the amount of criminal fines at common law. This Court, however, considered and rejected indistinguishable arguments in *Ice*. See 555 U.S. at 170.

Furthermore, extending *Apprendi*'s rule to criminal fines would run counter to *Ice*'s approval of legislatively developed rules that benefit the defendant by constraining judicial discretion. "[S]tatutory protections" limiting judicial discretion in this way "serve[] the 'salutary objectives' of promoting sentences proportionate to 'the gravity of the offense,' and of reducing disparities in sentence[s]." *Ice*, 555 U.S. at 169, 171 (citations omitted). Numerous States have adopted such protections, including requirements to make days-of-violation findings (although, as noted above, the question presented has been litigated only rarely since *Apprendi*).

Petitioner argues that a fine that turns on the duration of an offense does not implicate the "classic" sentencing concerns "about the nature of the offense or the character of the defendant" that the Court had in mind in *Ice*. Pet. 20 (citation omitted). But, as the court of appeals explained, "this argument misses * * * the flow of the logic used by the *Ice* majority." Pet. App. 31a. "[H]istoric practice * * * at common law [was that] judges' discretion in imposing fines was largely unfettered." *Ibid.*

The court of appeals properly recognized that, in *Ice*, this Court "specifically cautioned that it would be senseless to use *Apprendi* to nullify sentencing schemes in which legislatures have curtailed the discretion judges had at common law." Pet. App. 31a. The decision of the court of appeals, therefore, correctly applied the twin

considerations that this Court identified in *Ice* in considering whether to extend the *Apprendi* rule to a new context. Further review is not warranted.

3. The court of appeals held that if any *Apprendi* error occurred, it was not harmless beyond a reasonable doubt. Pet. App. 34a. The court of appeals, however, applied an incorrect harmless-error standard, and the district court's judgment may be affirmed on the alternative ground that any Sixth Amendment violation was harmless. No jury could have reasonably concluded that Southern Union illegally stored the mercury for less than 120 days (approximately four months), the period necessary to support the $6 million fine that the district court actually imposed.[4] The indictment charged and the evidence overwhelmingly proved that petitioner illegally stored the mercury for more than two years. Because petitioner would not be entitled to reversal even if it were to prevail on the question presented, this case does not warrant plenary review.

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[4] The district court also imposed a $12 million "community service obligation" as a special condition of probation, but did not expressly state whether it considered that payment to be in the nature of restitution or a fine. Pet. App. 34a-35a. The court of appeals did not resolve how that payment should be characterized, but stated that the issue would be open in the event of any remand. According to the district court, the purpose of the grantmaking fund was to "pay forward * * * the damage that's been done to the community and to benefit people in the State of Rhode Island in a manner that relates to this crime in perpetuity." C.A. App. 2780. The community-service obligation therefore is not part of the fine, but resembles restitution. The courts of appeals unanimously agree that restitution is a civil remedy not subject to the holding of *Apprendi*. See, *e.g.*, *United States* v. *Milkiewicz*, 470 F.3d 390, 402-404 (1st Cir. 2006). Petitioner expressly does not challenge that consensus. Pet. 17 n.10.

a. "Failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error," and such an error thus does not require reversal if it is harmless. *Washington* v. *Recuenco*, 548 U.S. 212, 222 (2006); see also *Neder* v. *United States*, 527 U.S. 1, 18 (1999) (failure to submit an element of the offense to the jury may be harmless error).

In the *Apprendi* context, the proper focus of harmless-error analysis is on the sentence that the district court actually imposed. If the sentence actually imposed does not exceed the statutory maximum supported by the jury verdict or defendant's admissions, no Sixth Amendment violation occurs at all. See, *e.g.*, *United States* v. *Booker*, 543 U.S. 220, 267 (2005) (respondent Fanfan's sentence, which was based only on the jury verdict, "d[id] not violate the Sixth Amendment," whereas respondent Booker's sentence violated the Sixth Amendment because the district court "*imposed* a sentence higher than the maximum authorized solely by the jury's verdict") (emphasis added); accord, *e.g.*, *United States* v. *Kelly*, 519 F.3d 355, 363 (7th Cir. 2008); *United States* v. *Eirby*, 262 F.3d 31, 39 (1st Cir. 2001) ("[M]ere exposure to a higher potential sentence does not violate *Apprendi*, [because] * * * the *Apprendi* doctrine [i]s concerned with *actual* sentences as opposed to *potential* sentences."). Any *Apprendi* error here, therefore, could only have been in *imposing* a $6 million fine, not in *considering* a maximum fine of $38.1 million.

The court of appeals, therefore, erred in requiring the government to prove "that the mercury was treated as waste *throughout* the period in the indictment," *i.e.*, for 762 days. Pet. App. 34a (emphasis added); see also *ibid.* (stating that an *Apprendi* error is harmless if the

evidence overwhelmingly establishes "the statutory maximum under which the defendants were sentenced") (citation omitted). That would be correct if the district court had imposed a $38.1 million fine. Because the district court imposed a $6 million fine, however, any *Apprendi* error is harmless so long as the evidence clearly establishes that petitioner violated RCRA for 120 days—about four months. See 42 U.S.C. 6928(d) (authorizing fine of $50,000 per day of violation).

b. The indictment charged petitioner with illegally storing mercury without a permit "[f]rom on or about September 19, 2002 until on or about October 19, 2004." Pet. App. 41a. Petitioner does not dispute that it stored the mercury without a permit beginning and ending on the dates alleged in the indictment. As the district court found, there was "clear and essentially irrefutable" evidence that the mercury was stored as early as September 19, 2002. *Id.* at 47a.

Rather, petitioner argues that the jury may have credited its defense that the mercury was a "commercial chemical product that the company intended to recycle" and thus required no permit. Pet. 4-5; Pet. App. 7a. The court of appeals thought that argument sufficient to rebut the government's harmless-error showing. But the court of appeals failed to recognize that RCRA required a permit to store spent mercury *regardless* of petitioner's purported intent to recycle the material (intent that was not credible in any event).

The evidence overwhelmingly established that the mercury was "spent material," and thus required a permit even if "accumulated, stored, or treated before" reclamation, *i.e.*, recycling as specified in the regulations. 40 C.F.R. 261.2(a)(2)(i)(B) and (c) & tbl. 1; see also 40 C.F.R. 261.6(c)(1); *Howmet Corp.*, 614 F.3d at 547; p. 2,

supra. A spent material is "any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing." 40 C.F.R. § 261.1(c)(1). The evidence showed that the mercury at issue was used and contaminated and that it had little or no commercial value until it was purified by a four-stage distillation process. C.A. App. 1631-1637, 1710-1740, 1852-1854, 1881-1882, 1922, 1931-1933, 2238-2242, 2251-2265, 2269-2270, 3137-3151, 3156-3169.

The court of appeals thought it significant that "as late as the summer of 2004, [petitioner's] employees discussed a potential mercury recycling project." Pet. App. 33a. But whether or not company officials contemplated recycling the mercury, they had long since recognized that the mercury was useless without further processing and that it was waste. As early as 2001, a company official described the accumulated materials as "spent HG [mercury]" and discussed keeping them in a "HAZWaste storage area." C.A. App. 1517, 2834-2835. At trial, that official conceded that "spent" is "equivalent to waste." *Id.* at 1510. As several employees admitted, "[petitioner] had no use for any of the mercury it accumulated." Pet. App. 4a; C.A. App. 903, 966, 1519. Accordingly, despite petitioner's alleged intent to reclaim the mercury, a RCRA waste-storage permit was required.

Moreover, even if an intent to recycle spent material could be enough to defeat RCRA liability, petitioner's alleged intent to recycle was refuted by its own internal statements and by the deplorable conditions under which it stored the mercury. Company employees and documents repeatedly referred to the mercury as "waste" that the company wanted to "get rid of" and that required "disposal." Pet. App. 5a; C.A. App. 997,

1009-1010, 1047, 1071, 2085, 3131-3134, 3137-3169. The company stored the mercury in kiddie pools, a milk jug, a paint can, glass jars, and plastic containers inside an unsecured, dilapidated brick building that company officials admitted was used to store "junk." Pet. App. 3a-4a; C.A. App. 445-450, 569, 574-575, 1520, 2805-2807, 2812, 2827. In short, petitioner treated the mercury as a waste, not as a valuable commodity that it intended to recycle.

In light of the overwhelming evidence, no rational jury could have concluded that Southern Union illegally stored the mercury for less than the two years alleged in the indictment, let alone less than the four months necessary to support the fine imposed by the district court. Because any *Apprendi* error was harmless beyond a reasonable doubt, the fine imposed by the district court should be affirmed whether or not fines are subject to *Apprendi* analysis. Accordingly, this case is a poor vehicle for considering the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF

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IN THE

Supreme Court of the United States

SOUTHERN UNION COMPANY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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INTRODUCTION

The United States' opposition does not contest that the decision below conflicts with the decisions of other courts of appeals on the important question whether the principles that this Court established in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and its progeny, apply to the imposition of criminal fines. The opposition also fails to refute petitioner's showing that the decision below conflicts with the clear holding in *Apprendi* and its progeny. This case thus raises a recurring and important question of criminal sentencing law that arises in a multitude of sentencing contexts and implicates the Fifth and Sixth Amendment rights of numerous criminal defendants. The purported vehicle issue raised by the United States amounts to nothing more than a premature and incautious attempt to litigate the merits of this case.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS THAT APPLY THE *APPRENDI* PRINCIPLE TO CRIMINAL FINES.

A. The United States does not dispute that the Second, Sixth and Seventh Circuits have held that the *Apprendi* principle applies to the imposition of criminal fines and have vacated criminal fines as a result. See Pet. at 12-15; *United States* v. *Pfaff*, 619 F.3d 172 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 3059, 3060 (2011); *United States* v. *LaGrou Distrib. Sys., Inc.*, 466 F.3d 585 (7th Cir. 2006); *United States* v. *Yang*, 144 F. App'x 521 (6th Cir. 2005). It also does not dispute that the Ninth Circuit, federal district courts, state supreme courts, and commentators have

assumed that the *Apprendi* principle applies to fines, and that the First Circuit's ruling below is at odds with all of those determinations. See Pet. at 15-17 & nn. 7-9. Instead, the United States contends that the decision below does not create a circuit conflict because "no other court of appeals has considered" the application of the *Apprendi* doctrine to fines "in light of this Court's decision in" *Oregon* v. *Ice*, 555 U.S. 160 (2009). Opp. at 9; see also *id.* at 11 (characterizing *Ice* as "intervening authority" and asserting that courts "have only begun to apply that refinement in the context of criminal fines"). This attempt to deny the clear conflict is unpersuasive.

First, there can be no question that the courts of appeals have issued conflicting rulings on the question presented in the Petition, regardless of the rationale that the First Circuit used in reaching its holding. These precedents are binding on lower courts in their respective circuits and will give rise to differential treatment of similarly-situated defendants absent intervention by this Court. The United States' suggestion that all of the federal and state courts that have aligned against the First Circuit on this issue could conceivably change their positions in light of *Ice* is fanciful speculation – and not a reason for this Court to defer considering the merits of an important constitutional question on which the courts of appeals are squarely split.

Second, even if the United States were correct that this Court should wait for a post-*Ice* conflict, such a conflict already exists. The Second Circuit's decision in *Pfaff* was issued more than a year and a half *after* this Court decided *Ice*, and *Pfaff* squarely conflicts with the decision below. The conflict is no less "genuine," Opp. at 11, merely because the United States – for reasons it chose not to explain – "did not

raise [the *Ice*] argument or cite *Ice*" in *Pfaff*, *id.* at 10, and the Second Circuit did not raise the issue *sua sponte*. That only serve to undermine the United States' recently-acquired view that *Ice* has relevance beyond the exceedingly narrow ruling in that case.

Third, the United States wholly fails to mention an even more recent federal court decision that clearly conflicts with the decision below, and also rebuts its speculation that courts will – at some unknowable future date – line up with the First Circuit and adopt its view of *Ice*. *United States* v. *AU Optronics Corp.*, No. C 09-00110 SI (N.D. Cal. filed Feb. 4, 2009), is a pending criminal price fixing case in which the United States is seeking up to $1 billion in fines under the alternative fine statute, 18 U.S.C. § 3571(d) – an amount that is *ten times* the fine that the Sherman Act authorizes. Expressly relying on the First Circuit's holding below that *Apprendi* does not apply to criminal fines, the United States filed a pretrial motion seeking an order that the evidence presented in the penalty phase need not be presented to the jury.

The district court denied the government's motion in an order issued a few days after the Petition in this case was filed. *See United States* v. *AU Optronics Corp.*, 2011 U.S. Dist. LEXIS 77494 (N.D. Cal. July 18, 2011). The court rejected the United States' argument that it "should follow the First Circuit," stating that it was "unconvinced" by the First Circuit's reliance on "*dicta*" in *Ice* to reach the conclusion that *Apprendi* does not apply to fines. *Id.* at *10-11. It also reasoned that "the sentencing decision in *Ice* – whether to impose concurrent or consecutive sentences – seems of a different character than the sentencing decision" in the case before it, which "much more closely resembles the sentencing

scheme in *Apprendi* than the binary decision between concurrent and consecutive sentences at issue in *Ice*." *Id.* at *11.

The *AU Optronics* decision confirms that the United States is laboring under a fantasy that the square conflict in the lower courts on *Apprendi* will magically disappear. The United States' underlying motion in that case illustrates the sort of sentences and sentencing procedures that it is now pursuing based on the decision below. Because the United States will continue to pursue fines exceeding the statutory maximum based on non-jury fact-finding in other district courts, and certainly in district courts in the First Circuit, the question presented in the Petition is ripe for review now.

B. Petitioner also demonstrated that this case is an appropriate vehicle for resolving the circuit conflict because the issue is squarely presented and the First Circuit expressly found that the question of *Apprendi*'s applicability is dispositive and outcome determinative in this case. See Pet. at 17; see also Pet. App. 2a ("any error under *Apprendi* was not harmless"), 32a-33a ("if we are wrong and if *Apprendi* does apply to criminal fines, it would be necessary to remand for resentencing"), 34a (same). The United States nonetheless now contends that the court of appeals "applied an incorrect harmless-error standard" and that "any Sixth Amendment violation was harmless," with the consequence that "petitioner would not be entitled to reversal even if it were to prevail on the question presented." Opp. at 16.

The United States' palpably desperate attempt to identify a vehicle problem is unavailing. The core *Apprendi* issue is cleanly and squarely presented in this case, and warrants this Court's review because of the indisputable conflict among the circuits that has

arisen on this vital constitutional question. The First Circuit's opinion all but screams out that result. Though the United States is wrong as regards the harmless error issue, that case-specific diversion does not present a reason for this Court to postpone deciding the fundamental constitutional issue presented here. The United States is free to defend the judgment on the alternative ground that the court of appeals erred in unanimously finding that any error on its part could not be harmless, but the threshold *Apprendi* issue still needs to be resolved.

Petitioner will fully respond to any such attempt to defend the judgment below at the appropriate time, but notes here that the United States is foreclosed from arguing (see Opp. at 16-18) that the First Circuit applied an incorrect legal standard when assessing harmless error because the standard that the First Circuit applied was the one that the United States itself proposed. The First Circuit applied the harmless error standard set forth in *United States* v. *Soto-Beniquez*, 356 F.3d 1, 46 (1st Cir. 2004), which held that "[a]n *Apprendi* error is harmless where the evidence overwhelmingly establishes" the facts "needed to justify the statutory maximum under which the defendants were sentenced." See Pet. App. 34a (quoting *Soto-Beniquez*). This is the very standard that the United States advocated in its brief to the First Circuit. See Br. for the Appellee, United States of America at 47, *United States* v. *S. Union Co.*, No. 09-2403 (1st Cir. Apr. 7, 2010) ("U.S. First Cir. Br.") (citing *Soto-Beniquez* as the applicable harmless error standard). Accordingly, any error on the First Circuit's part was invited by the United States and cannot provide a basis for a ruling in its favor. See *Puckett* v. *United States*, 129 S. Ct. 1423, 1428 (2009) ("If a litigant believes that an error has

occurred (to his detriment) during a federal judicial proceeding, he must object in order to preserve the issue. If he fails to do so in a timely manner, his claim for relief from the error is forfeited."); *cf. City of Springfield* v. *Kibbe*, 480 U.S. 257, 259 (1987) (per curiam) (dismissing writ as improvidently granted in part because "there would be considerable prudential objection to reversing a judgment because of [jury] instructions that petitioner accepted, and indeed itself requested").[1]

In all events, the court of appeals' finding that the *Apprendi* violation was not harmless is fully supported by the record. As noted, Pet. at 4-5, the court of appeals acknowledged that Southern Union's primary defense at trial was that "the mercury was not a waste" that required a permit, but rather was "a commercial chemical product that the company intended to recycle," Pet. App. 7a, and the court found that "Southern Union produced evidence that at several points throughout the indictment period, and as late as the summer of 2004, Southern Union employees discussed a potential mercury recycling project," *id.* at 33a. This finding was amply supported by the record. See, *e.g.*, C.A. App. 1456-57 (Southern Union's environmental manager testifying that on July 9, 2004, only 100 days from the end of the period charged in the indictment (October 19,

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[1] Relatedly, the United States' argument (Opp. at 18) that "any *Apprendi* error is harmless so long as the evidence clearly establishes that petitioner violated RCRA for 120 days" – enough to authorize the "$6 million fine" – is not what the United States argued below. In the First Circuit, the United States conceded for purposes of the harmless error analysis that the fine was "$18 million," and that "the threshold necessary to support" such fine was at least "360 days of illegal storage." *See* U.S. First Cir. Br. at 48.

2004), he prepared a request to ship the mercury to a recycler); *id.* at 2297-99 (outside contractor testifying that in September 2004 – only 20 to 45 days before the end of the period charged – he discussed recycling the mercury with Southern Union's environmental manager). Given this and other evidence establishing that there were several points in time near the end of the indictment period when the jury could have concluded that Southern Union's intent first changed from storing the mercury as a commercial chemical product for recycling, to discarding it as a waste, the court of appeals correctly held that the district court's finding that the statutory maximum fine should be based on a violation of 762 days was not harmless error.[2]

The United States is likewise wrong that the court of appeals erred in finding that the *Apprendi* violation was not harmless because "[t]he evidence overwhelmingly established that the mercury was 'spent material,'" *i.e.*, contaminated or unusable without processing, and thus Southern Union was required to have a permit regardless of its intent to recycle. Opp. at 18-19. First, the government's "spent material" theory is unsound because if it had thought that the mercury was waste *ab initio*, it would have charged Southern Union with the illegal transportation of waste mercury to its Pawtucket, Rhode Island storage facility without a hazardous waste permit, *which it did not do*. In any event, testimony from both government and defense witnesses showed that the liquid mercury was "pure

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[2] This same evidence demonstrated that there was no harmless error as to the actual fine imposed of $18 million (the amount the United States conceded before the First Circuit) or even as to a fine of $6 million (the amount the United States now claims was the fine amount).

elemental mercury," was pourable, and was at least 99% pure, demonstrating that there was not "overwhelming" evidence that it was either contaminated or useless as a commercial product so as to render it "spent" material. See, *e.g.*, C.A. App. 2232, 2239-2240, 2242-2245, 3223 (Tr. Exh. 307), 2267-2268, 2284-2285, 2287-2290, 3136 (Tr. Exh. 185), 1891-1895, 1906-1907, 3360 (Tr. Exh. K-11).

II. THE COURT OF APPEALS' RULING UNDERMINES CRIMINAL DEFENDANTS' FIFTH AND SIXTH AMENDMENT RIGHTS.

Petitioner further demonstrated (Pet. at 18-25) that the decision below merits review because it is not faithful to the Fifth and Sixth Amendments, and undermines the fundamental protections that this Court identified in *Apprendi* and its progeny. In particular, petitioner demonstrated that the broad language of *Apprendi* and its progeny applies without qualification to criminal *punishment* and *penalties* – not merely incarceration – and that the historical analysis that this Court relied upon to derive the *Apprendi* principle applies with equal force to both criminal fines and incarceration. Petitioner then demonstrated that neither the dicta nor reasoning in *Ice* that the First Circuit relied upon provides a sound basis for its contrary conclusion that the *Apprendi* principle does not apply to fines.

The United States does not respond to petitioner's analysis of *Apprendi* and largely repeats the First Circuit's arguments with respect to *Ice*, without responding to most of petitioner's critique of those arguments. Opp. at 13-16. Since these issues go to the merits of the case, petitioners will not address them further here, other than to note that the parties' arguments at this stage make plain that the decision

below raises substantial and important constitutional issues that warrant this Court's review.

III. THE COURT OF APPEALS' RULING POSES AN ISSUE OF FUNDAMENTAL IMPORTANCE.

Petitioner also demonstrated (Pet. at 26-28) that the court of appeals' ruling presents a recurring and important question of criminal sentencing law that arises in a multitude of sentencing contexts and affects numerous criminal defendants. Petitioner's *amici* provide additional compelling evidence of the importance of the issue, demonstrating that fines are "a significant component of the penalties faced by individuals," particularly in white-collar prosecutions, and a "central component of the penalties faced by organizations," which cannot be incarcerated. Brief for the Chamber of Commerce of the United States of America and the National Association of Criminal Defense Lawyers as *Amici Curiae* in Support of Petitioner at 2 ("Chamber/NACDL Br.").

Contrary to its representation below that the question whether the *Apprendi* principle applies to criminal fines "ha[s] far-reaching ramifications"[3] – and despite its acknowledgment that "a substantial number of federal and state statutes . . . calibrate criminal fines based on factual findings," Opp. at 12 – the United States now contends that "[t]he question presented does not recur with sufficient frequency to justify plenary review," *id.* at 13. Its principal argument is that *Apprendi* issues have "limited relevance in guilty-plea cases" and that "nearly all" defendants who receive fines are convicted pursuant to guilty pleas. *Id.* at 12. This argument, however,

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[3] *See* U.S. First Cir. Br. at 43.

proves too much. Nearly all federal criminal defendants who receive *any* type of sentence are convicted pursuant to guilty pleas,[4] yet this Court has never hesitated to address issues concerning the scope and application of *Apprendi*. See Pet. at 26. If anything, the prevalence of guilty pleas provides an additional reason for the Court *to address* the issue. As *amici* point out, "prosecutors regularly use criminal fines as bargaining chips in white-collar plea negotiations," and a "mere preponderance" burden of proof for fines would create a "perverse incentive" for "even innocent defendants . . . to plead guilty simply to avoid the risk of a large fine should they be convicted at trial." Chamber/NACDL Br. at 12, 13.

Finally, the fact that "relatively few cases have arisen" in which "the parties disputed the applicability of *Apprendi*'s holding to fines" is unsurprising, given that the United States itself apparently did not dispute the applicability of the *Apprendi* principle to fines before (and even after) *Ice* was decided. See Opp. at 13. Now that the United States has changed its position and a circuit split has developed, however, the Court should grant review to ensure that defendants' Fifth and Sixth Amendment rights are protected when they are sentenced to criminal fines.

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[4] U.S. Sentencing Comm'n, *2010 Sourcebook of Federal Sentencing Statistics* fig.C, *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/FigureC.pdf (last viewed Oct. 27, 2011) (96.8 percent of all federal criminal convictions in 2010 involved guilty pleas).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

SOUTHERN UNION COMPANY,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition For A Writ Of Certiorari To The U.S. Court Of Appeals For The First Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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UBS Banker and Financial Adviser with Conspiring to Hide More than $215 Million in Swiss Bank Accounts (Aug. 4, 2011), available at http://www.justice.gov/usao/nys/pressreleases/August11/gislergianindictmentpr.pdf 17

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in—or itself initiates—cases that raise issues of vital concern to the Nation's business community.

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit, professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes or misconduct. NACDL has over 11,000 members and over 40,000 affiliate members. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL regularly files *amicus curiae* briefs in this Court in cases that implicate the rights of criminal defendants.

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[1] Each party has consented to the filing of this brief. No party's counsel authored this brief in whole or in part. And no party, party's counsel, or other person other than *amici*, their counsel, and their members made a monetary contribution intended to fund this brief's preparation or submission.

Amici believe this Court's review is critical to ensuring uniform nationwide enforcement of the Sixth Amendment right to have "any fact (other than prior conviction) that increases the maximum penalty for a crime ... be ... submitted to a jury, and proven beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000). Specifically, *amici* are concerned that, in the First Circuit, the Sixth Amendment no longer applies to "fact[s] (other than prior conviction) that increase[] the maximum penalty for a crime" by increasing the maximum fine.

A fine is an important part of "the ... penalty for a crime." In white-collar prosecutions in particular, fines represent a significant component of the penalties faced by individuals, including those represented by NACDL's members. And because a corporation cannot be incarcerated, fines represent the central component of the penalties faced by organizations, like members of the Chamber. The decision below, however, permits the sentencing judge to increase the maximum fine based upon facts found by a mere preponderance of the evidence. Accordingly, *amici* respectfully urge this Court to grant review.

INTRODUCTION

The Resource Conservation and Recovery Act ("RCRA") makes it a crime to store mercury without a permit. 42 U.S.C. § 6928(d)(2)(A). This offense is punishable by a prison term of up to two years and a fine of up to $50,000 for each day of unlawful storage. *Id.* § 6928(d). That is, the maximum penalty for storing mercury without a permit is a two-year prison term plus a $50,000 fine if the storage lasted

one day, a two-year prison term plus a $100,000 fine if the storage lasted two days, and so on.

This Court has made clear that the Sixth Amendment requires that "any fact (other than prior conviction) that increases the maximum penalty for a crime ... be ... submitted to a jury, and proven beyond a reasonable doubt." *Apprendi*, 530 U.S. at 476; *see Cunningham v. California*, 549 U.S. 270, 281–82 (2007); *United States v. Booker*, 543 U.S. 220, 244 (2005); *Blakely v. Washington*, 542 U.S. 296, 301 (2004); *Ring v. Arizona*, 536 U.S. 584, 600 (2002). And this Court has confirmed that this rule applies to facts that "increase[] the maximum penalty for a crime" by increasing the maximum fine. *See Booker*, 543 U.S. at 244, 245.

In the context of a RCRA violation, the duration of unlawful mercury storage is a fact that "increases the maximum penalty." Namely, the longer the duration, the larger the maximum fine. 42 U.S.C. § 6928(d). The import of this Court's Sixth Amendment jury-trial cases, then, seems clear: Duration of unlawful storage must be proved to the jury beyond a reasonable doubt. Indeed, the Second, Sixth, and Seventh Circuits have held precisely that. Pet. 12–16 (discussing cases).

Not so, however, according to the First Circuit. Pet. App. 25a. That court upheld a sentencing judge's decision to subject Petitioner Southern Union Company to a maximum RCRA fine of $38.1 million—corresponding to 762 days of unlawful mercury storage—even though the jury found the company guilty of storing mercury unlawfully only for one day. *Id.* The panel found no error, because a preponderance of the evidence supported the longer period. *See*

id. Proof beyond a reasonable doubt was not required; in the panel's view the Sixth Amendment does not apply to criminal fines. *Id.*

The First Circuit recognized that a fine indisputably is a component of "the penalty" for a RCRA violation. *See id.* at 26a. And it acknowledged that this Court has held time and again that increasing "the penalty" for a crime beyond the statutory maximum requires jury factfinding. *Id.* at 26a–27a (citing *Cunningham*, 549 U.S. 270; *Booker*, 543 U.S. 220; *Blakely*, 542 U.S. 296; *Ring*, 536 U.S. 584; *Apprendi*, 530 U.S. 476). Nevertheless, the panel determined that this express, repeated directive must yield to the "logic and method" of this Court's recent decision in *Oregon v. Ice*, 555 U.S. 160 (2009), which in the panel's view cut the other way. Pet. App. 28a.

In *Ice*, the Court held that the Sixth Amendment does not govern factfinding necessary to enable the penalties for two separate crimes to run consecutively rather than concurrently. 555 U.S. at 163. As the First Circuit read *Ice*, this was because, as a historical matter, the judge, and not the jury, made this determination. Pet. App. 28a. Judges historically set the amounts of criminal fines, as well, according to the panel. *Id.* at 30a–31a. Therefore, the panel reasoned, *Ice* compels the conclusion that the Sixth Amendment does not govern factfinding necessary to authorize a particular fine amount. *Id.* at 31a.

This Court should grant the petition for a writ of certiorari for at least three reasons. *First*, the decision below conflicts with this Court's decision in *Booker*, which held that a sentencing scheme permitting and sometimes requiring judges to impose a fine greater than the maximum fine authorized by the

jury verdict alone violates the Sixth Amendment. Properly read, *Ice* does not suggest otherwise. Yet, in the short time since *Ice* was decided, the decision has been misread so drastically that this Court should step in *now* to eliminate the potential for further confusion.

Second, exempting criminal fines from Sixth Amendment scrutiny will undermine the efficacy of the justice system by making innocent defendants more likely to plead guilty. This is particularly true in white-collar and corporate prosecutions, where fines are a significant and often predominant part of the entire penalty. By refusing to require that facts determining the maximum amount of a criminal fine be proved to the jury beyond a reasonable doubt, the decision below makes those criteria harder to contest, and a large fine upon conviction thus harder to avoid. Therefore, even innocent defendants will be more likely to relinquish their jury-trial rights and plead guilty to avoid the possibility of a large fine upon conviction.

Third, subjecting criminal fines to Sixth Amendment scrutiny will not force prosecutors to compromise their law-enforcement efforts. The Antitrust Division of the Department of Justice, as well as multiple U.S. Attorneys' Offices, have been operating as if the Sixth Amendment *does* apply to criminal fines, and their experiences suggest that proceeding in this way does not make a prosecutor's office any less able to fight crime.

REASONS FOR GRANTING THE PETITION

I. The decision below conflicts with this Court's decision in *Booker*.

A. *Amici* agree with Petitioner (Pet. 18–25) that the decision below conflicts with *Apprendi*. *Amici* submit that it also conflicts with *Booker*, which, at least in part, dealt concretely with criminal fines. *See United States v. Yang*, 144 F. App'x 521, 524 (6th Cir. 2005) (holding that enhancing the maximum fine using facts found by a preponderance of the evidence violates *Booker*).

For each defendant convicted of a federal crime, the U.S. Sentencing Guidelines (the "Guidelines") recommend a particular penalty range, *i.e.*, a minimum and maximum prison term and a minimum and maximum fine, based upon criteria determinable by reference to the jury's verdict. But the Guidelines also recommend "enhancing" that range—increasing the minimum and maximum penalty—if a preponderance of the evidence supports various additional offender- and offense-specific findings. *See* U.S. Sentencing Guidelines Manual ch. 1, pt. A (2010).

Congress's sentencing statute made these "recommendations" mandatory: A court *had* to impose a sentence within the "enhanced" Guidelines range (the range determined by reference *both* to the facts found by the jury beyond a reasonable doubt *and* to the facts found by the court by a preponderance). 18 U.S.C. § 3553(b)(1) (2000). As a result, courts in certain situations were permitted or even compelled to impose a sentence—including a fine—greater than the maximum the Guidelines would have authorized

based solely on the jury's verdict. *See generally Booker*, 543 U.S. at 233–37.

In *Booker*, the Court held that this sentencing scheme violated the Sixth Amendment. *Id.* at 244. This was because the scheme in certain situations permitted or required judges to impose sentences greater than the maximum sentence authorized by the jury's verdict alone. *Id.* But the Court did not simply condemn this scheme to the extent it related to factfinding that increased an offender's maximum prison term. The Court condemned it *in toto*, including factfinding that increased an offender's maximum fine. *See id.*; *see also id.* at 245.

Thus, *Booker* makes clear that using preponderance factfinding to increase the fine beyond the maximum authorized by the jury's verdict alone violates the Sixth Amendment. Yet that is exactly what the First Circuit did below.

B. The panel concluded that even if its ruling could be said to conflict with *Apprendi* and *Booker*, *Ice* "effected a change in the application of the *Apprendi* rule to the issue in this case" that rendered moot any conflict with prior precedent. Pet. App. 31a. The panel recognized that *Ice* itself had nothing to do with the subject of *Apprendi*, namely factfinding that increases *the* maximum penalty for *a* crime. *See id.* at 27a. Rather, *Ice* concerned factfinding that resulted in the penalties for two separate crimes—each penalty already having been determined consistently with the Sixth Amendment—being imposed consecutively rather than concurrently. *Id.* Nevertheless, the panel concluded that the "logic and method" of *Ice*

indicates that the Sixth Amendment does not apply to factfinding that increases a maximum fine. *Id.* at 28a.

The panel observed that the *Ice* Court (1) noted that, as a historical matter, the consecutive-versus-concurrent decision was made by judges, not juries, and (2) held that the decision to impose penalties consecutively rather than concurrently does not trigger Sixth Amendment scrutiny. *Id.* at 27a–28a. From these two data points, the panel determined that *Ice* stands for the proposition that the Sixth Amendment applies only to forms of punishment that historically were entrusted to juries. *Id.* at 28a. The panel concluded that judges always had set the amounts of criminal fines, so the Sixth Amendment does not apply to them. *Id.*

The panel read *Ice* incorrectly. *First*, as an initial matter, *Ice* explains that it does not purport to call into question "[a]ll of the[] decisions involv[ing] sentencing for a discrete crime," which hold without deviation that any fact (other than prior conviction) that increases a crime's maximum penalty—like duration of unlawful mercury storage under RCRA—must be proved to the jury. 555 U.S. at 167. Thus, *Ice* simply has nothing to say about the type of factfinding used to enhance Petitioner's fine in this case.

Second, the proper historical inquiry is not whether the judge set the amount of a criminal fine. Rather, as *Ice* makes clear, the question is whether the judge when doing so was bound by any pre-set statutory limit determinable by reference only to the jury's verdict. *See id.* at 163, 168–70. On this score,

as the *Apprendi* Court noted, fines and prison terms stand on precisely the same footing: "From the beginning of the Republic, federal judges were entrusted with wide sentencing discretion ... to impose any term of imprisonment and any fine *up to the statutory maximum*." 530 U.S. at 482 n.9 (quoting Kate Stith & Jose Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 9 (1988)) (emphasis added in *Apprendi*); *see United States v. Woodruff*, 68 F. 536, 538 (D. Kan. 1895) (holding that an embezzlement statute providing for a fine equal to the amount embezzled "contemplates that there should be an ascertainment of the exact sum for which a fine may be imposed," and "[o]n such an issue the defendant is entitled to his constitutional right of trial by jury"). The discretion of state judges was similarly limited. *See, e.g., Illinois v. Clark*, 2 Ill. 117, 1833 WL 2696, at *4 (Ill. 1833) (holding that an indictment for violating a statute providing for fine equal to the value of the property destroyed "should have charged the value of the property destroyed, otherwise it could not properly have been inquired into by the jury").

Properly understood, then, *Ice* does not change the Sixth Amendment landscape. Indeed, when the Second Circuit in *United States v. Pfaff*, 619 F.3d 172, 175 (2d Cir. 2010) held that the Sixth Amendment applies to criminal fines, it did not even see the need to discuss *Ice*. Yet, in the short time since *Ice* has been decided, other courts, like the First Circuit below, have misread *Ice* as having sparked a sea change. Pet. App. 31a ("Our view [is] that *Ice* has effected a change in the application of the *Apprendi* rule ...."); *Missouri v. Andrews*, 329 S.W.3d 369, 374

n.3 (Mo. 2010) ("Justice Ginsburg's majority opinion in *Ice* signals a change in the Court's Sixth Amendment right-to-jury-trial analysis ...."); *New Mexico v. Rudy B.*, 243 P.3d 726, 732 (N.M. 2010) ("*Ice* signals change. ... The opinion does appear to represent a pivotal turning point in the Court's Sixth Amendment analysis ....").

The Antitrust Division of the Department of Justice has made this same error. In the wake of *Booker*, the Antitrust Division expressly conceded that the Sixth Amendment required it to prove to a jury beyond a reasonable doubt each fact necessary to obtain a fine above the maximum authorized by a Sherman Act conviction. *Criminal Remedies: Hearings Before the Antitrust Modernization Comm'n* 38 (2005) [hereinafter *Criminal Remedies*] (testimony of Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement). Yet, following *Ice*, the Antitrust Division did an about-face: It disavowed that earlier concession and began advocating precisely the opposite position, *i.e.*, that the Sixth Amendment does not apply to criminal fines. Its explanation: *Ice* changed everything, and its earlier position had been formulated "without the benefit of the Supreme Court's subsequent guidance in ... *Ice*." United States' Reply in Support of Motion for Order Regarding Fact Finding for Sentencing under 18 U.S.C. § 3571(d) at 10 n.4, Hammond Aff. at 1, *United States v. Au Optronics Corp.*, No. 09-cr-00110 (N.D. Cal. July 11, 2011), ECF No. 350.

Confusion over *Ice*'s place in this Court's Sixth Amendment jurisprudence already has infected federal and state courts, as well as at least one

division of the Department of Justice. This Court should grant review immediately to prevent that confusion from spreading further.

II. Exempting criminal fines from Sixth Amendment scrutiny undermines the efficacy of the justice system, especially in white-collar cases.

A. Fines are an important part of the criminal justice system. And in white-collar prosecutions, where allegations of large financial gains and losses are commonplace, fines represent a particularly significant part of "the penalty for a crime." This is because, in the federal system and in many states, statutes authorize fines of double the offender's gain or the victim's loss no matter the substantive offense of conviction.[2] And other statutes, like the federal Racketeer Influenced and Corrupt Organizations ("RICO") statute and its state analogs, provide for gain- and loss-based fines in specific instances.[3]

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[2] *See, e.g.*, 18 U.S.C. § 3751(d) (double the gain or loss); Fla. Stat. Ann. § 775.083(1)(f) (same); N.J. Stat. Ann. § 2C:43-3(e) (same); Haw. Rev. Stat. § 706-640(1)(f) (double the gain); Ky. Rev. Stat. § 534.030(1) (same); N.Y. Penal L. § 80.00(1)(b) (same); Pa. Cons. Stat. § 1101(8) (same).

[3] *See, e.g.*, 18 U.S.C. § 1963(a) (double the RICO profits); Colo. Rev. Stat. § 18-17-105(2) (triple the RICO gain or loss); *see also, e.g.*, 18 U.S.C. §§ 201(b) (bribery of a public official subject to a fine of up to triple the value of the bribe); 653 (embezzlement by public official subject to a fine of up to the amount embezzled); 1956(a)(1) (money laundering subject to a fine of up to double the value of the money laundered).

Accordingly, prosecutors regularly use criminal fines as bargaining chips in white-collar plea negotiations. Specifically, the prosecutor threatens to seek a large fine in the event that the Government obtains a conviction, and then promises to seek a smaller fine if the defendant will plead guilty and save the Government the cost of a trial. *See* Symposium, *Law and the Continuing Enterprise: Perspectives on RICO*, 65 Notre Dame L. Rev. 1073, 1089 (1990) (remarks of Professor John C. Coffee, Jr.) (observing that prosecutors use RICO's twice-the-gain fine in precisely this way). Ideally, an innocent defendant would reject this offer. But, by making the large fine so easy to obtain—by holding that the facts necessary to authorize it need only be proved by a preponderance of the evidence—the decision below increases the likelihood that an innocent defendant will take the deal. *See Blakely*, 542 U.S. at 311; Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1034 (2006); Nancy J. King & Susan R. Klein, *Apprendi and Plea Bargaining*, 54 Stan. L. Rev. 295, 296, 306 (2001).

When a prosecutor offers to agree to a smaller fine if the defendant will plead guilty, the defendant will consider his ability to contest the criteria on which the maximum amount of the fine is based. The stronger his ability to meaningfully dispute those factors, the more likely he will be to opt for a trial: If he can negate those facts, then the risks of an unsuccessful bid for acquittal are not as severe. Conversely, the weaker the defendant's ability to meaningfully dispute the fine criteria, the more likely he will be to take the deal: If he cannot disprove them, then even a small risk of conviction could be too

much given the high likelihood of a large fine if convicted. *See Blakely*, 542 U.S. at 311; King & Klein, 54 Stan. L. Rev. at 296, 306; *cf.* Barkow, 58 Stan. L. Rev. at 1034.

By permitting maximum-fine criteria to be found by a judge by a mere preponderance, rather than demanding that they be proved to a jury beyond a reasonable doubt as the Sixth Amendment requires, the decision below makes those findings significantly harder to contest. It turns the fine into the "tail which wags the dog of the substantive offense" charged, *Apprendi*, 530 U.S. at 495, because it makes even innocent defendants more likely to plead guilty simply to avoid the risk of a large fine should they be convicted at trial.

B. This perverse incentive is stronger still for organizational defendants. Corporations, unlike individuals, cannot be incarcerated. Thus, fines not only are *an* important part of the potential penalty, they are the *most* important part. *See* Jed S. Rakoff & Jonathan S. Sack, Federal Corporate Sentencing: Compliance and Mitigation § 1.06[6] (2011) (discussing U.S. Sentencing Commission data on organizational sentencing). Thus, unlike an individual defendant, a corporation cannot rest assured that, even if fines may be determined based upon preponderance factfinding, at least one significant component of the sentence (incarceration) will be subject to the rigors of the Sixth Amendment. Rather, in the corporate context, the Sixth Amendment simply does not apply to sentencing. Thus, the "tail" will "wag[] the dog" even more strongly.

Not only is the perverse incentive for an innocent defendant to plead guilty stronger for corporations, but its effects—the consequences of that guilty plea—arguably are more harmful in the corporate context, as well. For one thing, unlike individual defendants, corporations have shareholders. These shareholders depend on the corporation; to the extent they have made an investment, the corporation's wealth is their wealth. A criminal conviction, especially one accompanied by a large fine, can decrease that wealth immensely. For another, unlike most individual defendants, corporations have employees. A guilty plea followed by a steep corporate fine may cause these employees to lose their jobs and their retirement security. *See* John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 Am. Crim. L. Rev. 1329, 1341 & n.44 (2009).

The decision below makes the criminal justice system more likely to malfunction. This Court should grant review to help prevent that from happening.

III. Subjecting criminal fines to Sixth Amendment scrutiny will not compromise law enforcement.

The experiences of the Antitrust Division of the Department of Justice and multiple U.S. Attorneys' Offices demonstrate that applying the Sixth Amendment to criminal fines will not prevent prosecutors from effectively fighting crime.

A. The Antitrust Division relies heavily upon criminal fines in enforcing the Sherman Act and promoting commercial competition. But, because the

maximum penalties authorized by a Sherman Act conviction ($1 million for individual offenders and $100 million for organizational offenders) often amount to significantly less than the damage done by the most harmful anticompetitive behavior, the Division in these most critical cases turns to the general federal double-the-gain-or-loss fine statute, 18 U.S.C. § 3571(d). *See* Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, *Antitrust Sentencing in the Post-Booker Era: Risks Remain High for Non-Cooperating Defendants*, Remarks Before the American Bar Association Section of Antitrust Law (Mar. 30, 2005).

After *Booker*, the Antitrust Division became concerned that proving gain by a preponderance of the evidence and using that proof to seek a fine in excess of the Sherman Act maximum no longer would pass Sixth Amendment muster. So, it began alleging gain and loss figures in its indictments and preparing to prove them beyond a reasonable doubt to the jury in the event of trial. *Criminal Remedies* 38 (Hammond testimony). Yet, the evidence indicates that this has not hampered the Antitrust Division's ability to use § 3571(d) to obtain fines well above the Sherman Act maximum.[4] Indeed, four of the top five § 3571(d)

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[4] Accordingly, even though the Antitrust Division now takes the view that, as a matter of law, the Sixth Amendment does not apply to criminal fines (*see* Part I.B, *supra*), it does *not* argue that, as a matter of practicality, applying the Sixth Amendment to criminal fines prevents it from doing its job effectively.

antitrust fines imposed upon corporations in the past quarter-century have been obtained after the Antitrust Division began treating the Sixth Amendment as applicable to criminal fines.[5]

B. The Northern District of Illinois is the busiest district in the Seventh Circuit, and its U.S. Attorney's Office brings some of the circuit's most sophisticated and most noteworthy white-collar prosecutions. Yet, following the Seventh Circuit's decision in *United States v. LaGrou Distribution Systems, Inc.*, 466 F.3d 585, 597 (7th Cir. 2006), which held that the Sixth Amendment applies to criminal fines, that office does not appear to have experienced a downturn in its fine collection. In fact, in that district, the average median fine-plus-restitution award since *LaGrou* is more than triple what it was before.[6]

C. The U.S. Attorney's Office for the Southern District of New York brings some of the most important financial prosecutions not only in the Second Circuit but in the entire country. While the Second Circuit only recently held that the Sixth Amendment applies to criminal fines, *see Pfaff*, 619 F.3d at 175, prosecutors in the Southern District do not appear skittish about preparing to prove gain or loss beyond

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[5] *See* Antitrust Division, *Sherman Act Violations Yielding a Corporate Fine of $10 Million or More* (July 12, 2011), available at http://www.justice.gov/atr/public/criminal/sherman10.pdf.

[6] *See* U.S. Sentencing Comm'n Fiscal Year By-District Data, found in the Commission's Sourcebooks, available at http://www.ussc.gov/Data_and_Statistics/archives.cfm.

a reasonable doubt in order to seek high fines using 18 U.S.C. § 3571(d), even where such gain or loss could soar into the hundreds of millions of dollars.[7]

All of this is to say that subjecting criminal fines to Sixth Amendment scrutiny will not cause law enforcement to grind to a halt. There simply is no compelling reason to subvert this Court's unbroken line of Sixth Amendment jurisprudence squarely holding that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be ... submitted to a jury, and proven beyond a reasonable doubt." *Apprendi*, 530 U.S. at 476; *see Cunningham*, 549 U.S. at 281–82; *Booker*, 543 U.S. at 244; *Blakely*, 542 U.S. at 301; *Ring*, 536 U.S. at 600.

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[7] *See, e.g.*, U.S. Attorney, Southern District of New York, *Manhattan U.S. Attorney Charges Former UBS Banker and Financial Adviser with Conspiring to Hide More than $215 Million in Swiss Bank Accounts* (Aug. 4, 2011) (stating that the maximum fine will be twice the value of the gross gain or loss caused by the alleged conspiracy to avoid paying taxes on more than $215 million), available at http://www.justice.gov/usao/nys/pressreleases/August11/gialergianindictmentpr.pdf.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 19, 2011

JOINT APPENDIX

RECOR
AND
BRIEFS

No. 11-94

IN THE

Supreme Court of the United States

SOUTHERN UNION COMPANY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

JOINT APPENDIX

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NOTICE

The following documents have been omitted from the printing of this Joint Appendix. They may be found in the Appendix to the Petition For A Writ Of Certiorari at the following pages:

United States v. *S. Union Co.*, 630 F.3d 17 (1st Cir. 2010) 1a

United States v. *S. Union Co.*, Cr. No. 07-134-S, 2009 WL 2032097 (D.R.I. July 9, 2009) 39a

United States v. *S. Union Co.*, No. 09-2403 (1st Cir. Feb. 17, 2011) (order denying petitions for rehearing and rehearing en banc) 49a

U.S. DISTRICT COURT
DISTRICT OF RHODE ISLAND (PROVIDENCE)

Criminal Docket for Case #:
1:07-cr-00134-S-DLM-1
Date Filed: 10/16/2007

USA

v.

SOUTHERN UNION COMPANY

DOCKET ENTRIES

DATE	#	DOCKET TEXT
10/16/2007	1	INDICTMENT as to Southern Union Company (1) count(s) 1, 2, 3. (Attachments: # 1 Criminal Cover Sheet) (Noel, Jeannine) (Entered: 10/16/2007)
10/16/2007		CASE CONDITIONALLY ASSIGNED to Senior Judge Ernest C. Torres. Related Case Number CA06-45T based upon the indication on the cover sheet that a related case previously was assigned to the presiding judge. The assignment is subject to the presiding judge's determination that the cases, in fact, are related. (Noel, Jeannine) (Entered: 10/16/2007)

DATE	#	DOCKET TEXT
10/16/2007	2	NOTICE OF ATTORNEY APPEARANCE: Gerald J. Petros appearing for Southern Union Company (Petros, Gerald) (Entered: 10/16/2007)
10/16/2007	3	NOTICE OF ATTORNEY APPEARANCE: John A. Tarantino appearing for Southern Union Company (Tarantino, John) (Entered: 10/16/2007)
10/16/2007	4	NOTICE OF ATTORNEY APPEARANCE: Patricia K. Rocha appearing for Southern Union Company (Rocha, Patricia) (Entered: 10/16/2007)
10/17/2007		NOTICE OF HEARING as to Southern Union Company Arraignment set for 10/26/2007 10:00 AM in Courtroom A before Magistrate Judge Lincoln D. Almond. (Noel, Jeannine) (Entered: 10/17/2007)
10/17/2007		NOTICE OF HEARING as to Southern Union Company: In Chambers Conference set for *10/25/2007 at 10:00 AM in Chambers 214* before Judge Ernest C. Torres. (Jackson, Ryan) (Entered: 10/17/2007)
10/22/2007		NOTICE RESCHEDULING HEARING as to Southern Union Company Arraignment RESCHEDULED for 10/29/2007 11:30 AM in Courtroom A before Magistrate Judge Lincoln D. Almond. MOVED FROM

DATE	#	DOCKET TEXT
		10/26. (Noel, Jeannine) (Entered: 10/22/2007)
10/22/2007		NOTICE OF HEARING DEFENDANT REQUEST as to Southern Union Company Arraignment RESCHEDULED for 10/29/2007 11:30 AM in Courtroom A before Magistrate Judge Lincoln D. Almond. MOVED FROM 10/26. (Noel, Jeannine) (Entered: 10/22/2007)
10/25/2007		Minute Entry for proceedings held before Judge Ernest C. Torres: In Chambers Conference as to Southern Union Company held on 10/25/2007; all counsel of record present. (Jackson, Ryan) (Entered: 10/25/2007)
10/26/2007	5	Process Receipt and Return Executed by United States Marshal on 10/19/07 (Jackson, Ryan) (Entered: 10/26/2007)
10/26/2007	6	Summons Returned Executed on 10/19/07 as to Southern Union Company (Jackson, Ryan) (Entered: 10/26/2007)
10/29/2007		Minute Entry for proceedings held before Magistrate Judge Lincoln D. Almond: Arraignment as to Southern Union Company (1) Count 1, 2, 3 held on 10/29/2007 (Donnelly, Tarantino, Petros) PTS Bradley; Secretary's Certificate presented to

DATE	#	DOCKET TEXT
		the Court; Certificate accepted; Attorneys Tarantino and Petros allowed to enter plea on behalf of company; No company representative is present; Court reads charges; Atty Tarantino enters not guilty plea on behalf of company; Company was informed of charges by attorneys; Arraignment order entered; Govt requests that a company representative be present for future hearings; Court grants request; Attys for Deft understands (Courtroom B at 11:33 a.m.) (Noel, Jeannine) (Entered: 10/29/2007)
10/29/2007	7	SECRETARY'S CERTIFICATE as to Southern Union Company accepted by MJ Almond (Noel, Jeannine) (Entered: 10/29/2007)
10/29/2007	8	ARRAIGNMENT ORDER as to Southern Union Company Motions due by 12/10/2007. Responses due by 12/20/2007 Jury Trial set for 12/21/2007 10:00 AM in Courtroom 3 before Judge Ernest C. Torres. Pretrial Conference set for 12/10/2007 09:30 AM in Magistrate Judge Almond Chambers – Room P-208 before Magistrate Judge Lincoln D. Almond. So Ordered by Magistrate Judge Lincoln D. Almond on 10/29/07. (Noel, Jeannine) (Entered: 10/29/2007)

DATE	#	DOCKET TEXT
11/05/2007		Case as to Southern Union Company Permanently Assigned to Judge Ernest C. Torres and Lincoln D. Almond. (Jackson, Ryan) (Entered: 11/05/2007)
11/07/2007	9	TRANSCRIPT REQUEST for proceedings held on October 25, 2007 before Judge Torres. (Petros, Gerald) (Entered: 11/07/2007)
11/13/2007	10	MOTION to Extend Time to File Motion Seeking Bill of Particulars WITH SUPPORTING MEMO by Southern Union Company. (Tarantino, John) (Entered: 11/13/2007)
11/16/2007	11	TRANSCRIPT of Proceedings as to Southern Union Company held on 10/25/07 before Judge Ernest C. Torres. Court Reporter: Debra D. Lajoie. (Smith, Rana) (Entered: 11/21/2007)
11/27/2007		Motions Forwarded to Chambers: 10 MOTION to Extend Time to File Motion Seeking Bill of Particulars (Jackson, Ryan) (Entered: 11/27/2007)
11/29/2007		MOTIONS as to Southern Union Company REFERRED; 10 MOTION to Extend Time to File Motion Seeking Bill of Particulars referred to Magistrate Judge Lincoln D. Almond for determination. (Jackson, Ryan) (Entered: 11/29/2007)

DATE	#	DOCKET TEXT
11/29/2007	12	MOTION to Extend Time for Dates Set in Arraignment and Pretrial Discovery Order WITH SUPPORTING MEMO by Southern Union Company. (Tarantino, John) (Entered: 11/29/2007)
11/29/2007		TEXT ORDER granting absent objection 10 Motion to Extend Time within which to file motion seeking bill of particulars as to Southern Union Company (1). So Ordered by Magistrate Judge Lincoln D. Almond on 11/29/07. (Noel, Jeannine) (Entered: 11/29/2007)
12/03/2007		NOTICE OF CANCELLATION OF PRETRIAL CONFERENCE as to Southern Union Company. Pretrial conference scheduled for 12/10/07 is CANCELLED. (Noel, Jeannine) (Entered: 12/03/2007)
12/04/2007	13	RESPONSE in Opposition by USA as to Southern Union Company *Motion to Extend Time* (Donnelly, Terrence) (Entered: 12/04/2007)
12/06/2007	14	REPLY TO RESPONSE to Motion by Southern Union Company re 12 MOTION to Extend Time for Dates Set in Arraignment and Pretrial Discovery Order (Tarantino, John) (Entered: 12/06/2007)

DATE	#	DOCKET TEXT
12/06/2007		Motions Forwarded to Chambers: 12 MOTION to Extend Time for Dates Set in Arraignment and Pretrial Discovery Order (Jackson, Ryan) (Entered: 12/06/2007)
12/10/2007	15	MOTION for Bill of Particulars WITH SUPPORTING MEMO by Southern Union Company. (Tarantino, John) (Entered: 12/10/2007)
12/20/2007		NOTICE OF HEARING as to Southern Union Company Pretrial Conference set for 1/2/2008 02:00 PM in Magistrate Judge Almond Chambers – Room P-208 before Magistrate Judge Lincoln D. Almond. (Noel, Jeannine) (Entered: 12/20/2007)
12/20/2007		NOTICE OF HEARING ON MOTION in case as to Southern Union Company 12 MOTION to Extend Time for Dates Set in Arraignment and Pretrial Discovery Order: Motion Hearing set for *1/11/2008 at 9:30 AM in Courtroom 3* before Judge Ernest C. Torres. (Jackson, Ryan) (Entered: 12/20/2007)
12/21/2007	16	RESPONSE in Opposition by USA as to Southern Union Company 15 *Motion for a Bill of Particulars* (Donnelly, Terrence) Modified on 12/24/2007 – Created document

DATE	#	DOCKET TEXT
		linkage (Smith, Rana). (Entered: 12/21/2007)
12/28/2007	17	REPLY TO RESPONSE to Motion by Southern Union Company re 15 MOTION for Bill of Particulars (Tarantino, John) (Entered: 12/28/2007)
01/02/2008		Motions Forwarded to Chambers: 15 MOTION for Bill of Particulars (Jackson, Ryan) (Entered: 01/02/2008)
01/02/2008		Reset Hearings as to Southern Union Company re Notice of Hearing on Motion, 12 MOTION to Extend Time for Dates Set in Arraignment and Pretrial Discovery Order filed by Southern Union Company: Motion Hearing *re-scheduled for 1/17/2008 at 9:30 AM in Courtroom 3* before Judge Ernest C. Torres. (Jackson, Ryan) (Entered: 01/02/2008)
01/03/2008		MOTIONS as to Southern Union Company REFERRED to Magistrate Judge Lincoln D. Almond for determination: 15 MOTION for Bill of Particulars (Jackson, Ryan) (Entered: 01/03/2008)
01/04/2008		NOTICE OF HEARING ON MOTION in case as to Southern Union Company 15 MOTION for Bill of Particulars: Motion Hearing set for 1/11/2008 10:00 AM in Court-

DATE	#	DOCKET TEXT
		room B before Magistrate Judge Lincoln D. Almond. (Noel, Jeannine) (Entered: 01/04/2008)
01/11/2008		Minute Entry for proceedings held before Magistrate Judge Lincoln D. Almond: Motion Hearing as to Southern Union Company held on 1/11/2008 re 15 MOTION for Bill of Particulars filed by Southern Union Company (Donnelly, Chabot, Petros, Tarantino, Rocha) Argument; defendant's exhibit A marked; Court takes under advisement; Order to follow (Courtroom B at 10:02 a.m..) (Noel, Jeannine) (Entered: 01/11/2008)
01/11/2008	18	EXHIBIT LIST (Noel, Jeannine) (Entered: 01/11/2008)
01/11/2008	19	MEMORANDUM AND ORDER denying 15 Motion for Bill of Particulars as to Southern Union Company (1). So Ordered by Magistrate Judge Lincoln D. Almond on 1/11/08. (Noel, Jeannine) (Entered: 01/11/2008)
01/17/2008	20	TRANSCRIPT REQUEST for proceedings held on 1/17/2008 before Judge Torres. (Tarantino, John) (Entered: 01/17/2008)
01/17/2008		Minute Entry for proceedings held before Judge Ernest C. Torres: Motion Hearing as to Southern

DATE	#	DOCKET TEXT
		Union Company held on 1/17/2008 re 12 MOTION to Extend Time for Dates Set in Arraignment and Pretrial Discovery Order filed by Southern Union Company. Terrence Donnelly and Dianne Chabot for Government. John Tarantino, Gerald Petros and Patricia Rocha for Defendant. Court addresses. Arguments heard on Defendant's Motion. Court GRANTS motion to extend the discovery closure date to 3/17/08; GRANTS extention of time to file motions until 4/8/08 or whatever time the defendants have the information that would be the basis for filing such motion, whichever of these times comes first in order to prevent the Government from being flooded with all of Defendant's Motions on 4/8/08. Government's responses are due one week following the standard ten day pretrial motion response due date. (Court Reporter Debra Lajoie in Courtroom 3 at 9:26 AM.) (Smith, Rana) (Entered: 01/17/2008)
01/22/2008	21	TRANSCRIPT of Proceedings as to Southern Union Company held on 1/17/08 re: 12 Motion to Enlarge Dates Set in the Arraignment and Pretrial Discovery Order before Judge Ernest C. Torres. Court

DATE	#	DOCKET TEXT
		Reporter: Debra Lajoie. (Smith, Rana) (Entered: 01/24/2008)
01/29/2008	22	WRITTEN ORDER as to Southern Union Company GRANTING re 12 MOTION to Extend Time for Dates Set in Arraignment and Pretrial Discovery Order. Follows oral order of 1/17/08. So Ordered by Judge Ernest C. Torres on 1/29/08. (Smith, Rana) (Entered: 01/29/2008)
02/26/2008	23	MOTION to Compel *the Government to Produce Unredacted Documents* With Supporting Memo by Southern Union Company. (Attachments: # 1 Exhibit Copy of redacted/blacked-out pages) (Tarantino, John) (Entered: 02/26/2008)
02/26/2008	24	MOTION to *Compel the Government to Disclose the Identity of Persons Whom the Government Alleges Are or Were Southern Union Company's Agents* With Supporting Memo by Southern Union Company. (Tarantino, John) (Entered: 02/26/2008)
02/26/2008	25	MOTION for Disclosure *and Production of Charts, Summaries, Calculations and Underlying Materials* With Supporting Memo by Southern Union Company. (Tarantino, John) (Entered: 02/26/2008)

DATE	#	DOCKET TEXT
02/26/2008	26	MOTION to Compel *Disclosure of Other Crimes, Wrongs or Acts Under Fed.R.Evid. 404(b)* With Supporting Memo by Southern Union Company. (Tarantino, John) (Entered: 02/26/2008)
03/04/2008	27	MOTION to Compel *Production of Investigative Activity Report (IAR) of Robert Steere* by Southern Union Company. (Tarantino, John) (Entered: 03/04/2008)
03/11/2008	28	MOTION for Daniel J. Fetterman to Appear Pro Hac Vice by Southern Union Company. (Tarantino, John) (Entered: 03/11/2008)
03/12/2008	29	RESPONSE to Motion by USA as to Southern Union Company re 24 MOTION to Compel *the Government to Disclose the Identity of Persons Whom the Government Alleges Are or Were Southern Union Company's Agents* (Donnelly, Terrence) (Entered: 03/12/2008)
03/14/2008		NOTICE OF HEARING as to Southern Union Company: Telephone Conference set for *3/20/2008 at 9:30 AM in Chambers 214* before Judge Ernest C. Torres; this office will initiate the conference call; all counsel should provide contact numbers to the clerk if different than the listed phone numbers on

DATE	#	DOCKET TEXT
		the docket. (Jackson, Ryan) (Entered: 03/14/2008)
03/14/2008		Reset Hearings as to Southern Union Company re Notice of Hearing: In Chambers Conference set for *3/20/2008 at 9:30 AM in Chambers 214* before Judge Ernest C. Torres; previously scheduled as a teleconference, this conference will now be held *in chambers*. (Jackson, Ryan) (Entered: 03/14/2008)
03/14/2008	30	RESPONSE in Opposition by USA as to Southern Union Company 23 *Motion to Compel the Government to Produce Unredacted Documents* (Donnelly, Terrence) (Entered: 03/14/2008)
03/17/2008	31	RESPONSE to Motion by USA as to Southern Union Company re 26 MOTION to Compel *Disclosure of Other Crimes, Wrongs or Acts Under Fed.R.Evid. 404(b)* (Donnelly, Terrence) (Entered: 03/17/2008)
03/19/2008	32	RESPONSE to Motion by USA as to Southern Union Company re 25 MOTION for Disclosure *and Production of Charts, Summaries, Calculations and Underlying Materials* (Donnelly, Terrence) (Entered: 03/19/2008)

DATE	#	DOCKET TEXT
03/20/2008		MOTIONS as to Southern Union Company REFERRED to Magistrate Judge Lincoln D. Almond. 23 MOTION to Compel *the Government to Produce Unredacted Documents*, 26 MOTION to Compel *Disclosure of Other Crimes, Wrongs or Acts Under Fed.R.Evid. 404(b)*, 24 MOTION to Compel *the Government to Disclose the Identity of Persons Whom the Government Alleges Are or Were Southern Union Company's Agents* referred to Magistrate Judge Almond for determination. (Jackson, Ryan) (Entered: 03/20/2008)
03/20/2008		MOTIONS as to Southern Union Company REFERRED to Judge Magistrate Judge Lincoln D. Almond. 25 MOTION for Disclosure *and Production of Charts, Summaries, Calculations and Underlying Materials* referred to Magistrate Judge Lincoln D. Almond for determination. (Jackson, Ryan) (Entered: 03/20/2008)
03/20/2008		Minute Entry for proceedings held before Judge Ernest C. Torres: In Chambers Conference as to Southern Union Company held on 3/20/2008; all counsel of record present (Jackson, Ryan) (Entered: 03/20/2008)

DATE	#	DOCKET TEXT
03/20/2008	33	MOTION in Limine *to Preclude Reference at Trial to Other Lawsuits* WITH SUPPORTING MEMO by Southern Union Company. (Tarantino, John) (Entered: 03/20/2008)
03/20/2008	34	MOTION in Limine *to Exclude Evidence at Trial of the Discovery of Mercury and Remediation and Evacuation at the Lawn Terrace Apartment Complex* WITH SUPPORTING MEMO by Southern Union Company. (Tarantino, John) (Entered: 03/20/2008)
03/20/2008	35	MOTION in Limine *to Exclude Evidence at Trial About the Physical Conditions of and Lack of Security at the Tidewater Site* WITH SUPPORTING MEMO by Southern Union Company. (Tarantino, John) (Entered: 03/20/2008)
03/20/2008	36	MOTION to Strike *Surplusage From The Indictment* WITH SUPPORTING MEMO by Southern Union Company. (Tarantino, John) (Entered: 03/20/2008)
03/20/2008	37	ORDER OF RECUSAL in case as to Southern Union Company Judge Ernest C. Torres recused. Case reassigned to Judge William E. Smith for all further proceedings. So Ordered by Judge Ernest C.

DATE	#	DOCKET TEXT
		Torres on 3/20/08. (Jackson, Ryan) (Entered: 03/20/2008)
03/20/2008	38	RESPONSE to Motion by USA as to Southern Union Company re 27 MOTION to Compel *Production of Investigative Activity Report (IAR) of Robert Steere* (Donnelly, Terrence) (Entered: 03/20/2008)
03/21/2008		MOTIONS as to Southern Union Company REFERRED to Judge Magistrate Judge Almond. 27 MOTION to Compel *Production of Investigative Activity Report (IAR) of Robert Steere* Motions referred to Lincoln D. Almond for determination. (Baldinelli, Doreen) (Entered: 03/21/2008)
03/21/2008	39	TRANSCRIPT REQUEST for proceedings held on March 20, 2008 before Judge Torres. (Tarantino, John) (Entered: 03/21/2008)
03/24/2008		NOTICE OF HEARING as to Southern Union Company Status Conference set for 4/25/2008 at 3:30 PM in Judge Smith Chambers before Judge William E Smith. (Baldinelli, Doreen) (Entered: 03/24/2008)
03/24/2008	40	ORDER granting 28 Motion to Appear Pro Hac Vice of Daniel J Fetterman as to Southern Union Company (1). So Ordered by Judge William E Smith on 3/21/2008.

DATE	#	DOCKET TEXT
		(Baldinelli, Doreen) (Entered: 03/24/2008)
03/24/2008	41	ORDER OF RECUSAL in case as to Southern Union Company Magistrate Judge Lincoln D. Almond recused. Case reassigned to Magistrate Judge David L. Martin for referrals. So Ordered by Magistrate Judge Lincoln D. Almond on 3/24/08. (Noel, Jeannine) (Entered: 03/24/2008)
03/25/2008		NOTICE OF HEARING ON MOTIONS in case as to Southern Union Company 23 MOTION to Compel *the Government to Produce Unredacted Documents*, 27 MOTION to Compel *Production of Investigative Activity Report (IAR) of Robert Steere*, 24 MOTION to Compel *the Government to Disclose the Identity of Persons Whom the Government Alleges Are or Were Southern Union Company's Agents*, 25 MOTION for Disclosure *and Production of Charts, Summaries, Calculations and Underlying Materials*, 26 MOTION to Compel *Disclosure of Other Crimes, Wrongs or Acts Under Fed.R.Evid. 404(b)*: Motion Hearing set for 4/8/2008 10:00 AM in Courtroom B before Magistrate Judge David L. Martin.

DATE	#	DOCKET TEXT
		(Saucier, Martha) (Entered: 03/25/2008)
03/26/2008		Motions No Longer Referred to Magistrate Judge Almond as to Southern Union Company: 27 MOTION to Compel *Production of Investigative Activity Report (IAR) of Robert Steere*, 25 MOTION for Disclosure *and Production of Charts, Summaries, Calculations and Underlying Materials*, 23 MOTION to Compel *the Government to Produce Unredacted Documents*, 26 MOTION to Compel *Disclosure of Other Crimes, Wrongs or Acts Under Fed.R.Evid. 404(b)*, 24 MOTION to Compel *the Government to Disclose the Identity of Persons Whom the Government Alleges Are or Were Southern Union Company's Agents* (Baldinelli, Doreen) (Entered: 03/26/2008)
03/26/2008		MOTIONS as to Southern Union Company REFERRED to Judge Magistrate Judge Martin. 27 MOTION to Compel *Production of Investigative Activity Report (IAR) of Robert Steere*, 25 MOTION for Disclosure *and Production of Charts, Summaries, Calculations and Underlying Materials*, 23 MOTION to Compel *the Government to Produce Unredacted Documents*,

DATE	#	DOCKET TEXT
		26 MOTION to Compel *Disclosure of Other Crimes, Wrongs or Acts Under Fed.R.Evid. 404(b)*, 24 MOTION to Compel *the Government to Disclose the Identity of Persons Whom the Government Alleges Are or Were Southern Union Company's Agents* Motions referred to David L. Martin for determination. (Baldinelli, Doreen) (Entered: 03/26/2008)
03/28/2008	42	MOTION to Dismiss *Count I and Count III of the Indictment and Memo in Support* by Southern Union Company. (Attachments: # 1 Exhibit A) (Petros, Gerald) (Entered: 03/28/2008)
04/02/2008	43	NOTICE OF HEARING as to Southern Union Company Calendar Call set for 4/15/2008 at 9:00 AM in Courtroom 2 before Judge William E Smith. (Baldinelli, Doreen) (Entered: 04/02/2008)
04/02/2008	44	TRIAL NOTICE (Baldinelli, Doreen) (Entered: 04/02/2008)
04/02/2008	45	PRETRIAL SCHEDULING ORDER as to Southern Union Company Jury Selection set for 5/6/2008 AT 9:30 AM in Courtroom 2 before Judge William E Smith. So Ordered by Judge William E Smith on 4/2/2008. (Baldinelli, Doreen) (Entered: 04/02/2008)

DATE	#	DOCKET TEXT
04/02/2008	46	TRANSCRIPT of Proceedings: Chambers Conference as to Southern Union Company held on 3/20/08 before Judge Ernest C. Torres. Court Reporter: Karen Wischnowsky. (Smith, Rana) (Entered: 04/02/2008)
04/04/2008	47	RESPONSE in Opposition by USA as to Southern Union Company 35 *Motion in Limine to Exclude Reference at Trial to the Physical Conditions of and Lack of Security at the Tidewater Site* (Donnelly, Terrence) Modified on 4/8/2008 – created document linkage (Zinni, Concetta). (Entered: 04/04/2008)
04/08/2008		Minute Entry for proceedings held before Magistrate Judge David L. Martin: Motion Hearing as to Southern Union Company held on 4/8/2008 re 27 MOTION to Compel *Production of Investigative Activity Report (IAR) of Robert Steere* filed by Southern Union Company, 25 MOTION for Disclosure *and Production of Charts, Summaries, Calculations and Underlying Materials* filed by Southern Union Company, 23 MOTION to Compel *the Government to Produce Unredacted Documents* filed by Southern Union Company, 26 MOTION to Compel *Disclosure of Other Crimes, Wrongs*

DATE	#	DOCKET TEXT
		or Acts Under Fed.R.Evid. 404(b) filed by Southern Union Company, 24 MOTION to Compel *the Government to Disclose the Identity of Persons Whom the Government Alleges Are or Were Southern Union Company's Agents* filed by Southern Union Company. Terrence Donnelly for the government; Patricia Rocha and Gerald Petros for the defendant. Attorneys argue motion to compel production of unredacted documents; Court directs the government to submit documents for in camera review within seven days; and the Court grants the motion as to release of certain information regarding witnesses; Defendant states other four motions may pass by agreement of the parties. Court to issue an order. (Courtroom B at 10:14.) (Saucier, Martha) (Entered: 04/08/2008)
04/08/2008	48	ORDER granting in part 23 Motion to Compel as to Southern Union Company (1). So Ordered by Magistrate Judge David L. Martin on 4/8/08. (Saucier, Martha) (Entered: 04/08/2008)
04/08/2008		TEXT ORDER passed by agreement of the parties, as stated by counsel at the 4/8/08 hearing 24 Motion to Compel as to Southern Union Com-

DATE	#	DOCKET TEXT
		pany (1); passed for compliance 25 Motion for Disclosure as to Southern Union Company (1); passed for compliance 26 Motion to Compel as to Southern Union Company (1); passed for compliance 27 Motion to Compel as to Southern Union Company (1). So Ordered by Magistrate Judge David L. Martin on 4/8/08. (Saucier, Martha) (Entered: 04/08/2008)
04/08/2008	49	RESPONSE in Opposition by USA as to Southern Union Company *Motion in Limine re Lawn Terrace Apartment Complex* (Donnelly, Terrence) (Entered: 04/08/2008)
04/09/2008	50	TRANSCRIPT REQUEST for proceedings held on 4/8/08 before Judge Magistrate Judge Martin. (Rocha, Patricia) (Entered: 04/09/2008)
04/09/2008	51	RESPONSE to Motion by USA as to Southern Union Company re 33 MOTION in Limine *to Preclude Reference at Trial to Other Lawsuits* (Donnelly, Terrence) (Entered: 04/09/2008)
04/10/2008		FORWARDED TRANSCRIPT REQUEST 50, CD OF PROCEEDING, AND COPY OF DOCKET TO JOSEPH FONTES as to Southern Union Company. (Saucier, Martha) (Entered: 04/10/2008)

DATE	#	DOCKET TEXT
04/11/2008	52	RESPONSE to Motion by USA as to Southern Union Company re 36 MOTION to Strike *Surplusage From The Indictment* (Donnelly, Terrence) (Entered: 04/11/2008)
04/17/2008	53	NOTICE OF COMPLETION OF IN CAMERA REVIEW AND RULING by Southern Union Company. Entered by Magistrate Judge David Martin (Saucier, Martha) Modified on 4/18/2008 (Zinni, Concetta). (Entered: 04/17/2008)
04/21/2008	54	TRANSCRIPT of Proceedings as to Southern Union Company held on April 8, 2008 before Magistrate Judge David L. Martin. Court Reporter: Joseph A. Fontes. (Geile, Wendy) (Entered: 04/21/2008)
04/25/2008		REVISED NOTICE OF HEARING as to Southern Union Company Status Conference reset for 4/25/2008 at 1:00 PM in Judge Smith Chambers — before Judge William E Smith. (Geile, Wendy) (Entered: 04/25/2008)
04/25/2008	55	RESPONSE to Motion by USA as to Southern Union Company re 42 MOTION to Dismiss *Count I and Count III of the Indictment and Memo in Support* (Donnelly, Terrence) (Entered: 04/25/2008)

DATE	#	DOCKET TEXT
04/25/2008		Minute Entry for proceedings held before Judge William E Smith: Status Conference as to Southern Union Company held on 4/25/2008. Terrence Donnelly and Kevin Cassidy for Government. Gerald Petros, Daniel Fetterman (via telephone) and John Tarantino for Defendant. All counsel of record present. Second Status conference scheduled for May 7, 2008 at 3:30pm. (Geile, Wendy) (Entered: 04/25/2008)
04/25/2008		NOTICE OF HEARING as to Southern Union Company. Status Conference set for 5/7/2008 at 3:30 PM in Judge Smith Chambers — before Judge William E Smith. (Geile, Wendy) (Entered: 04/25/2008)
05/08/2008		NOTICE OF HEARING ON MOTION in case as to Southern Union Company 33 MOTION in Limine *to Preclude Reference at Trial to Other Lawsuits*, 42 MOTION to Dismiss *Count I and Count III of the Indictment and Memo in Support*, 35 MOTION in Limine *to Exclude Evidence at Trial About the Physical Conditions of and Lack of Security at the Tidewater Site*, 34 MOTION in Limine *to Exclude Evidence at Trial of the Discovery of Mercury and Remediation and Evacuation at the Lawn Terrace Apartment*

DATE	#	DOCKET TEXT
		Complex: Motion Hearing set for 6/11/2008 at 9:30 AM in Courtroom 2 before Judge William E Smith. (Geile, Wendy) (Entered: 05/08/2008)
05/09/2008	56	TRANSCRIPT REQUEST by USA for proceedings held on 01/17/08 before Judge Torres. (Donnelly, Terrence) (Entered: 05/09/2008)
05/19/2008		NOTICE OF HEARING as to Southern Union Company Jury Trial set for 9/22/2008 at 9:00 AM in Courtroom 2 before Judge William E Smith. (Baldinelli, Doreen) (Entered: 05/19/2008)
05/29/2008	57	MOTION Issuance of a Subpoena *Pursuant to 28 U.S.C. 1783(a)* by USA as to Southern Union Company. (Attachments: # 1 Text of Proposed Order, # 2 Proposed Subpoena) (Donnelly, Terrence) (Entered: 05/29/2008)
06/02/2008	58	REPLY TO RESPONSE to Motion by Southern Union Company re 55 Response to Motion (Attachments: # 1 Exhibits A through F) (Petros, Gerald) (Entered: 06/02/2008)
06/04/2008		NOTICE OF HEARING RE: 36 MOTION to Strike Surplusage From The Indictment as to Southern Union Company Motion Hearing set for 6/11/2008 at 9:30 AM in Courtroom 2 before Judge William

DATE	#	DOCKET TEXT
		E Smith. (Vorias, Doreen) (Entered: 06/04/2008)
06/10/2008		NOTICE OF HEARING Motion Hearing RE: 57 Motion for the Issuance of a Subpoena set for 6/11/2008 at 9:30 AM in Courtroom 2 before Judge William E Smith. (Vorias, Doreen) (Entered: 06/10/2008)
06/11/2008		Minute Entry for proceedings held before Judge William E Smith: Motion Hearing as to Southern Union Company held on 6/11/2008 re 33 MOTION in Limine *to Preclude Reference at Trial to Other Lawsuits* filed by Southern Union Company, 35 MOTION in Limine *to Exclude Evidence at Trial About the Physical Conditions of and Lack of Security at the Tidewater Site* filed by Southern Union Company, 34 MOTION in Limine *to Exclude Evidence at Trial of the Discovery of Mercury and Remediation and Evacuation at the Lawn Terrace Apartment Complex* filed by Southern Union Company, 57 MOTION Issuance of a Subpoena *Pursuant to 28 U.S.C. 1783(a)* filed by USA, 36 MOTION to Strike *Surplusage From The Indictment* filed by Southern Union Company, 42 MOTION to Dismiss *Count I and*

DATE	#	DOCKET TEXT
		Count III of the Indictment and Memo in Support filed by Southern Union Company. Terrence Donnelly, Kevin Cassidy and Dianne Chabot for Government. Gerald Petros, John Tarantino and Daniel Fetterman for Defendant. All counsel of record present. Arguments heard in regards to Defendant's Motion to Dismiss Counts I and II of the Indictment; Court takes matter under advisement and will issue a ruling. Arguments heard in regards to Defendant's Motion in Limine to Exclude Evidence at Trial About the Physical Conditions of and Lack of Security at the Tidewater Site; Court DENIES. Arguments heard in regards to Defendant's Motion to Preclude Reference at Trial to Other Lawsuits; Court reserves ruling. Arguments heard in regards to Defendant's Motion in Limine to Exclude Evidence at Trial of the Discovery of Mercury and Remediation and Evacuation at the Lawn Terrace Apartment Complex; Court DENIES. Arguments heard in regards to Defendant's Motion to Strike Surplusage from the Indictment; Court DENIES. Court addresses Government's Motion for the Issuance of Subpoena; Court

DATE	#	DOCKET TEXT
		GRANTS. (Court Reporter Anne Clayton in Courtroom 2 at 10:32 am.) (Geile, Wendy) (Entered: 06/11/2008)
06/11/2008		TEXT ORDER denying 34 Motion in Limine as to Southern Union Company (1); denying 35 Motion in Limine as to Southern Union Company (1); denying 36 Motion to Strike as to Southern Union Company (1); granting 57 Motion as to Southern Union Company (1). So Ordered by Judge William E Smith on 6/11/2008. (Geile, Wendy) (Entered: 06/11/2008)
06/11/2008	59	ORDER granting re 57 MOTION Issuance of a Subpoena *Pursuant to 28 U.S.C. 1783(a)* filed by USA. So Ordered by Judge William E Smith on 6/10/2008. (Geile, Wendy) (Entered: 06/11/2008)
06/11/2008	60	EXHIBIT LIST. (Geile, Wendy) (Entered: 06/11/2008)
06/11/2008	61	TRANSCRIPT REQUEST for proceedings held on June 11, 2008 before Judge Smith. (Tarantino, John) (Entered: 06/11/2008)
06/18/2008	62	TRANSCRIPT of Proceedings as to Southern Union Company held on June 11, 2008 before Judge Smith. Court Reporter/Transcriber Anne M. Clayton, Telephone number

DATE	#	DOCKET TEXT
		(401) 255-2310. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 7/9/2008. Redacted Transcript Deadline set for 7/21/2008. Release of Transcript Restriction set for 9/16/2008. (Clayton, Anne) (Entered: 06/18/2008)
08/05/2008	63	NOTICE OF HEARING as to Southern Union Company Calendar Call set for 8/19/2008 at 9:00 AM in Courtroom 2 before Judge William E Smith. (Vorias, Doreen) (Entered: 08/05/2008)
08/05/2008	64	TRIAL NOTICE. (Vorias, Doreen) (Entered: 08/05/2008)
08/05/2008	65	PRETRIAL SCHEDULING ORDER as to Southern Union Company Jury Selection set for 9/2/2008 at 9:30 AM in Courtroom 2 before Judge William E Smith. So Ordered by Judge William E Smith on 8/5/2008. (Vorias, Doreen) (Entered: 08/05/2008)
08/06/2008	66	DECISION AND ORDER denying 42 Motion to Dismiss Count one and three of the Indictment by Southern Union Company (1). So Ordered by

DATE	#	DOCKET TEXT
		Judge William E Smith on 8/5/2008. (Geile, Wendy) (Entered: 08/06/2008)
08/13/2008		NOTICE OF HEARING as to Southern Union Company Final Pretrial Conference set for 8/21/2008 at 3:30 PM in Judge Smith Chambers – before Judge William E Smith. (Vorias, Doreen) (Entered: 08/13/2008)
08/18/2008	67	MOTION for Use of Jury Questionnaire With Supporting Memo by Southern Union Company. (Tarantino, John) (Entered: 08/18/2008)
08/19/2008		REVISED NOTICE OF HEARING as to Southern Union Company Final Pretrial Conference RESET for 8/19/2008 at 11:00 AM in Judge Smith Chambers – before Judge William E Smith. (Geile, Wendy) (Entered: 08/19/2008)
08/19/2008	68	MOTION in Limine *to Exclude Testimony* with Supporting Memo by USA as to Southern Union Company. (Donnelly, Terrence) (Entered: 08/19/2008)
08/19/2008	69	TRANSCRIPT REQUEST for proceedings held on 8-19-2008 before Judge Smith. (Tarantino, John) (Entered: 08/19/2008)
08/19/2008		NOTICE OF HEARING as to Southern Union Company Final Pre-

DATE	#	DOCKET TEXT
		trial Conference set for 9/16/2008 at 10:00 AM in Judge Smith Chambers – before Judge William E Smith. (Geile, Wendy) (Entered: 08/19/2008)
08/19/2008		NOTICE OF HEARING as to Southern Union Company In Chambers Conference set for 9/3/2008 at 12:30 PM in Judge Smith Chambers – before Judge William E Smith. (Geile, Wendy) (Entered: 08/19/2008)
08/19/2008		Minute Entry for proceedings held before Judge William E Smith: Final Pretrial Conference as to Southern Union Company held on 8/19/2008. Terrence Donnelly for Plaintiff. Gerald Petros and John Tarantino for Defendant. All counsel of record present. Parties to submit proposed jury questionnaire to the court by August 25, 2008. (Geile, Wendy) (Entered: 08/19/2008) (Geile, Wendy) (Entered: 08/19/2008)
08/19/2008		NOTICE OF HEARING as to Southern Union Company Jury Selection set for 9/3/2008 at 2:00 PM in Courtroom 2 before Judge William E Smith. (Geile, Wendy) (Entered: 08/19/2008)
08/20/2008		REVISED NOTICE OF HEARING as to Southern Union Company Final Pretrial Conference (2nd) RESET for 9/18/2008 at 2:00 PM in

DATE	#	DOCKET TEXT
		Judge Smith Chambers – before Judge William E Smith. (Geile, Wendy) (Entered: 08/20/2008)
08/20/2008		TEXT ORDER granting 67 Motion for Use of Jury Questionnaire as to Southern Union Company (1). So Ordered by Judge William E Smith on 8/20/2008. (Geile, Wendy) (Entered: 08/20/2008)
08/20/2008		CORRECTIVE DOCKET ENTRY re: Final Pretrial Conference, held on 8/19/08; ERROR: Incorrect date entered for proposed jury questionnaire due date; CORRECTION: Parties to submit proposed jury questionnaires to the court by Tuesday, August 26, 2008. (Smith, Rana) (Entered: 08/20/2008)
08/22/2008	70	MOTION to Quash Subpoena WITH SUPPORTING MEMO by Marc Viera as to Southern Union Company. (Geile, Wendy) (Entered: 08/22/2008)
08/22/2008	71	TRANSCRIPT of Calendar Call Proceedings as to Southern Union Company held on August 19, 2008 before Judge William E. Smith. Court Reporter/Transcriber Anne M. Clayton, Telephone number (401) 255-2310. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/

DATE	#	DOCKET TEXT
		Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 9/12/2008. Redacted Transcript Deadline set for 9/22/2008. Release of Transcript Restriction set for 11/20/2008. (Clayton, Anne) (Entered: 08/22/2008)
08/25/2008	72	Assented MOTION for an Extension of Time to File Response/Reply as to 68 MOTION in Limine *to Exclude Testimony* by Southern Union Company. (Petros, Gerald) (Entered: 08/25/2008)
08/25/2008		Motion Forwarded to Chambers: 72 Assented MOTION for an Extension of Time to File Response/Reply as to 68 MOTION in Limine *to Exclude Testimony*. Motion forwarded to the Chambers of Judge William E. Smith. (Geile, Wendy) (Entered: 08/25/2008)
08/27/2008	73	TRIAL BRIEF by USA as to Southern Union Company (Donnelly, Terrence) (Entered: 08/27/2008)
08/27/2008	74	PRETRIAL MEMORANDUM by Southern Union Company (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit) (Petros, Gerald) (Entered: 08/27/2008)

DATE	#	DOCKET TEXT
08/27/2008		TEXT ORDER granting 72 Motion for Extension of Time to File Response/Reply as to Southern Union Company (1). Defendant shall have up to and including August 29, 2008 to respond to 68 Motion in Limine. So Ordered by Judge William E Smith on 8/27/2008. (Geile, Wendy) (Entered: 08/27/2008)
08/28/2008	75	NOTICE OF ATTORNEY APPEARANCE: Alexandra K. Callam appearing for Southern Union Company (Callam, Alexandra) (Entered: 08/28/2008)
08/28/2008		NOTICE OF HEARING as to Southern Union Company In Chambers Conference set for 8/29/2008 at 9:00 AM in Judge Smith Chambers – before Judge William E Smith. (Geile, Wendy) (Entered: 08/28/2008)
08/28/2008	76	RESPONSE to Motion by Southern Union Company re 70 MOTION to Quash (Tarantino, John) (Entered: 08/28/2008)
08/29/2008		Minute Entry for proceedings held before Judge William E Smith: In Chambers Conference as to Southern Union Company held on 8/29/2008. Terrence Donnelly for Government. Gerald Petros, John Tarantino and Daniel Fetterman (via telephone) for Defendant. All

DATE	#	DOCKET TEXT
		counsel of record present. (Geile, Wendy) (Entered: 08/29/2008)
08/29/2008	77	RESPONSE in Opposition by Southern Union Company re 68 MOTION in Limine *to Exclude Testimony with Supporting Memorandum* (Petros, Gerald) (Entered: 08/29/2008)
09/02/2008		Motion Forwarded to Chambers: 70 MOTION to Quash, 68 MOTION in Limine *to Exclude Testimony* (Geile, Wendy) (Entered: 09/02/2008)
09/02/2008	78	RESPONSE to Motion by USA as to Southern Union Company re 70 MOTION to Quash *Subpoena* (Donnelly, Terrence) (Entered: 09/02/2008)
09/03/2008		Minute Entry for proceedings held before Judge William E Smith: In Chambers Conference as to Southern Union Company held on 9/3/2008. Terrence Donnelly for Government. Gerald Petros and John Tarantino for Defendant. All counsel of record present. Parties review Jury Questionnaires. Parties exercise their challenges for cause. Twenty-eight (28) jurors called. (Court Reporter Anne Clayton.) (Geile, Wendy) (Entered: 09/03/2008)

DATE	#	DOCKET TEXT
09/03/2008		Minute Entry for proceedings held before Judge William E Smith: Jury Selection as to Southern Union Company held on 9/3/2008. Terrence Donnelly, AUSA; Dianne Chabot, AUSA; and Kevin Cassidy for Government. Gerald Petros, John Tarantino, Patricia Rocha and Daniel Fetterman for Defendant. All counsel of record present. Court addresses. Twenty-eight (28) jurors called; voir dire conducted; counsel exercise challenges; twelve (12) jurors empaneled. Eight (8) alternate jurors called; voir dire conducted; counsel exercise challenges; four (4) alternate jurors selected. (Court Reporter Anne Clayton in Courtroom 2 at 3:01 pm.) (Smith, Rana) (Entered: 09/04/2008)
09/04/2008		REVISED NOTICE OF HEARING as to Southern Union Company Final Pretrial Conference (2nd) RESET for 9/18/2008 at 3:00 PM in Judge Smith Chambers – before Judge William E Smith. (Geile, Wendy) (Entered: 09/04/2008)
09/04/2008		NOTICE OF HEARING as to Southern Union Company Motion Hearing re: 70 MOTION to Quash Subpoena set for 9/18/2008 at 2:00 PM in Courtroom 2 before Judge

DATE	#	DOCKET TEXT
		William E Smith. (Geile, Wendy) (Entered: 09/04/2008)
09/10/2008		TEXT ORDER setting briefing schedule re: Fundamental legal issues. Defendants memorandum due by 9/11/2008; Governments response due 9/17/2008 as to Southern Union Company. So Ordered by Judge William E Smith on 9/10/2008. (Geile, Wendy) (Entered: 09/10/2008)
09/11/2008	79	MOTION to Exclude *Federal Enforcement of Rhode Island State Regulations Concerning Conditionally Exempt Small Quantity Generators* with supporting memorandum by Southern Union Company. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit) (Petros, Gerald) (Entered: 09/11/2008)
09/11/2008	80	MOTION Motion to Determine Whether Under EPCRA the Release of Mercury at the Lawn Terrace Apartment Complex Constitutes a Separate Release with supporting memorandum by Southern Union Company. (Petros, Gerald) (Entered: 09/11/2008)
09/12/2008		NOTICE OF HEARING as to Southern Union Company In Chambers Conference set for 9/15/2008 at 8:30 AM in Judge Smith Chambers –

DATE	#	DOCKET TEXT
		before Judge William E Smith. (Geile, Wendy) (Entered: 09/12/2008)
09/15/2008		Minute Entry for proceedings held before Judge William E Smith: In Chambers Conference as to Southern Union Company held on 9/15/2008. Terrence Donnelly for Government. Gerald Petros, Patricia Rocha and Daniel Fetterman for Defendant. All counsel of record present. (Geile, Wendy) (Entered: 09/15/2008)
09/16/2008		NOTICE OF HEARING as to Southern Union Company In Chambers Conference set for 9/16/2008 at 2:00 PM in Judge Smith Chambers – before Judge William E Smith. (Geile, Wendy) (Entered: 09/16/2008)
09/16/2008		Motions Forwarded to Chambers: 80 MOTION Motion to Determine Whether Under EPCRA the Release of Mercury at the Lawn Terrace Apartment Complex Constitutes a Separate Release, 79 MOTION to Exclude *Federal Enforcement of Rhode Island State Regulations Concerning Conditionally Exempt Small Quantity Generators* (Geile, Wendy) (Entered: 09/16/2008)
09/16/2008		Minute Entry for proceedings held before Judge William E Smith: In Chambers Conference as to South-

DATE	#	DOCKET TEXT
		ern Union Company held on 9/16/2008. Terrence Donnelly for Government. Gerald Petros and Patricia Rocha for defendant. All counsel of record present. (Geile, Wendy) (Entered: 09/16/2008)
09/16/2008	81	MOTION in Limine *to Exclude Evidence of EPA Letters* with Supporting Memo by USA as to Southern Union Company. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2) (Donnelly, Terrence) (Entered: 09/16/2008)
09/17/2008	82	RESPONSE to Motion by USA as to Southern Union Company re 79 MOTION to Exclude *Federal Enforcement of Rhode Island State Regulations Concerning Conditionally Exempt Small Quantity Generators*, 80 MOTION Motion to Determine Whether Under EPCRA the Release of Mercury at the Lawn Terrace Apartment Complex Constitutes a Separate Release – *Consolidated Response* (Attachments: # 1 Exhibit A) (Donnelly, Terrence) (Entered: 09/17/2008)
09/17/2008	83	EXHIBIT IN SUPPORT by USA as to Southern Union Company in support of 82 Response to Motion, (Donnelly, Terrence) (Entered: 09/17/2008)

DATE	#	DOCKET TEXT
09/17/2008	84	TRANSCRIPT REQUEST for proceedings held on 9-3-2008 before Judge Smith. (Tarantino, John) (Entered: 09/17/2008)
09/17/2008	85	TRANSCRIPT REQUEST for proceedings held on 9-3-2008 before Judge Smith. (Tarantino, John) (Entered: 09/17/2008)
09/17/2008		NOTICE OF HEARING as to Southern Union Company Jury Selection set for 9/19/2008 at 9:00 AM in Courtroom 2 before Judge William E Smith. (Geile, Wendy) (Entered: 09/17/2008)
09/17/2008		Motion Forwarded to Chambers: 81 MOTION in Limine *to Exclude Evidence of EPA Letters* (Geile, Wendy) (Entered: 09/17/2008)
09/17/2008	86	TRANSCRIPT REQUEST for proceedings held on January 11, 2008 before Judge Almond. (Petros, Gerald) (Entered: 09/17/2008)
09/18/2008		Remark as to Southern Union Company: Transcript Request 86, tape and docket forwarded to Maryann Young, Court Reporter (Noel, Jeannine) (Entered: 09/18/2008)
09/18/2008		Amended Remark as to Southern Union Company: Transcript Request 86, tape and docket forwarded to Joseph Fontes, Court Reporter, via

DATE	#	DOCKET TEXT
		FED-EX (Noel, Jeannine) (Entered: 09/18/2008)
09/18/2008		Minute Entry for proceedings held before Judge William E Smith: Motion Hearing as to Southern Union Company held on 9/18/2008. (Donnelly, Chabot, Cassidy, Tarantino, Petros, Tamuleviz) All counsel of record present. Court addresses. Arguments heard on the following pending motions: 70 MOTION to Quash filed by Marc Viera, Court denies; 68 MOTION in Limine *to Exclude Testimony* filed by USA, Court takes under advisement; 79 MOTION to Exclude *Federal Enforcement of Rhode Island State Regulations Concerning Conditionally Exempt Small Quantity Generators* filed by Southern Union Company, argument on the Motion to continue 9/19/08 following Jury empanelment. (Court Reporter Anne Clayton in Courtroom 2 at 2:16 pm.) (Smith, Rana) (Entered: 09/19/2008)
09/18/2008		TEXT ORDER taking under advisement 68 Motion in Limine as to Southern Union Company (1); denying 70 Motion to Quash as to Southern Union Company (1). So Ordered by Judge William E Smith on 9/18/2008. (Smith, Rana) (Entered: 09/19/2008)

DATE	#	DOCKET TEXT
09/19/2008	87	TRANSCRIPT of Proceedings as to Southern Union Company held on January 11, 2008 before Judge Almond. Court Reporter/Transcriber Joseph A. Fontes, Telephone number 561-452-7507. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 10/10/2008. Redacted Transcript Deadline set for 10/20/2008. Release of Transcript Restriction set for 12/18/2008. (Fontes, Joseph) (Entered: 09/19/2008)
09/19/2008		Minute Entry for proceedings held before Judge William E Smith: Final Pretrial Conference as to Southern Union Company held on 9/19/2008. Terrence Donnelly, Dianne Chabot and Kevin Cassisy for Government. Gerald Petros, John Tarantino and Daniel Fetterman for Defendant. All counsel of record present. Jury trial in this matter to begin 9/22/08 at 9:00 am. (Geile, Wendy) (Entered: 09/19/2008)
09/19/2008		Minute Entry for proceedings held before Judge William E Smith: Jury Selection (Empanelment of Alternate

DATE	#	DOCKET TEXT
		Jurors) as to Southern Union Company held on 9/19/2008. (Donnelly, Chabot, Cassidy, Tarantino, Petros, Fetterman, Rocha) All counsel of record present. Court addresses. Seven (7) alternate jurors called; voir dire conducted; counsel exercise challenges; three (3) alternated [sic] selected. Government satisfied with alternate juror selection. Arguments heard as to Defense Counsels Oral objection to the empanelment of additional alternate jurors; Court denies. (Court Reporter Debra Lajoie in Courtroom 2 at 9:14 am.) (Smith, Rana) (Entered: 09/19/2008)
09/19/2008		Minute Entry for proceedings held before Judge William E Smith: Motion Hearing as to Southern Union Company held on 9/19/2008. (Donnelly, Chabot, Cassidy, Tarantino, Petros, Fetterman, Rocha) All counsel of record present. Continued arguments heard as to 79 MOTION to Exclude *Federal Enforcement of Rhode Island State Regulations Concerning Conditionally Exempt Small Quantity Generators* filed by Southern Union Company, Court takes under advisement. Arguments heard as to 80 Motion to Determine Whether Under EPCRA the Release of Mercury at the Lawn Terrace Apartment Complex Constitutes a

DATE	#	DOCKET TEXT
		Separate Release filed by Southern Union Company, Court denies. Arguments heard as to 81 MOTION in Limine *to Exclude Evidence of EPA Letters* filed by USA, Court defers ruling. (Court Reporter Debra Lajoie in Courtroom 2 at 10:11 am.) (Smith, Rana) (Entered: 09/19/2008)
09/19/2008		TEXT ORDER taking under advisement 79 Motion to Exclude as to Southern Union Company (1); denying 80 Motion as to Southern Union Company (1); deferring ruling on 81 Motion in Limine as to Southern Union Company (1). So Ordered by Judge William E Smith on 9/19/2008. (Smith, Rana) (Entered: 09/19/2008)
09/19/2008	88	MOTION to Take Deposition *and for Issuance of Subpoena for David Thatcher Pursuant to Rules 15 and 17(f)* by Southern Union Company. (Tarantino, John) (Entered: 09/19/2008)
09/20/2008	89	MOTION Issuance of Subpoenas by USA as to Southern Union Company. (Attachments: # 1 Exhibit AAG Approval of Motion, # 2 Text of Proposed Order) (Donnelly, Terrence) (Entered: 09/20/2008)

DATE	#	DOCKET TEXT
09/22/2008		Minute Entry for proceedings held before Judge William E Smith: Jury Trial (DAY 1) as to Southern Union Company held on 9/22/2008. (Donnelly, Chabot, Cassidy, Tarantino, Petros, Fetterman, Rocha) All counsel of record present. Jury in and sworn. Court instructs jurors. Government delivers opening statement. Defense counsel delivers opening statement. Two witnesses sworn. Twenty exhibits entered FULL; three exhibits for ID only. Jury Trial to continue Tuesday, 9/23/2008 at 9:00 am. (Court Reporter Anne Clayton in Courtroom 2 at 9:15 am.) (Smith, Rana) (Entered: 09/22/2008)
09/23/2008		Motion Forwarded to Chambers: 89 MOTION Issuance of Subpoenas (Geile, Wendy) (Entered: 09/23/2008)
09/23/2008	90	TRANSCRIPT REQUEST for proceedings held on September 19, 2008 before Judge Smith. (Tarantino, John) (Entered: 09/23/2008)
09/23/2008		Minute Entry for proceedings held before Judge William E Smith: Jury Trial (DAY 2) as to Southern Union Company held on 9/23/2008. (Donnelly, Chabot, Cassidy, Tarantino, Petros, Fetterman, Rocha) All counsel of record present. Jury in; Court addresses. Witness-2, contin-

DATE	#	DOCKET TEXT
		ued. Jury out; discussion out of jury presence. Motion 89 Government's Motion for Issuance of Subpoenas as to Southern Union Company; Court grants. Jury in. Three witnesses sworn. Twelve exhibits entered FULL; four exhibits for ID only. Jury Trial to continue Wednesday, 9/24/2008 at 9:00 am. (Court Reporter Anne Clayton/Debra Lajoie in Courtroom 2 at 9:13 am.) (Smith, Rana) (Entered: 09/23/2008)
09/23/2008		TEXT ORDER granting 89 Motion Issuance of Subpoenas by USA as to Southern Union Company (1). So Ordered by Judge William E Smith on 9/23/2008. (Smith, Rana) (Entered: 09/23/2008)
09/24/2008		Minute Entry for proceedings held before Judge William E Smith: Jury Trial (DAY 3) as to Southern Union Company held on 9/24/2008. (Donnelly, Chabot, Cassidy, Tarantino, Petros, Fetterman, Rocha) All counsel of record present. Jury in; court addresses. Witness-5, continued. Three witnesses sworn. Twenty exhibits entered FULL; five exhibits for ID only. One exhibit previously marked as ID on 9/22/08, entered FULL. Jury out; discussion out of jury presence. Defense counsel withdraws 88 Motion to Take Deposition

DATE	#	DOCKET TEXT
		and for Issuance of Subpoena for David Thatcher; Court finds as moot. Jury Trial to continue Thursday, 9/25/2008 at 9:00 am. (Court Reporter Anne Clayton in Courtroom 2 at 9:14 am.) (Smith, Rana) (Entered: 09/24/2008)
09/24/2008		TEXT ORDER finding as moot 88 Motion to Take Deposition as to Southern Union Company (1). So Ordered by Judge William E Smith on 9/24/2008. (Smith, Rana) (Entered: 09/24/2008)
09/25/2008		Minute Entry for proceedings held before Judge William E Smith: Jury Trial (DAY 4) as to Southern Union Company held on 9/25/2008. (Donnelly, Chabot, Cassidy, Tarantino, Petros, Fetterman, Rocha) All counsel of record present. Jury in; court addresses. Five witnesses sworn. Four exhibits entered FULL; one exhibit for ID only. Jury out; discussion out of jury presence. Jury Trial to continue Monday, 9/29/2008 at 9:00 am. (Court Reporter Anne Clayton in Courtroom 2 at 9:12 am.) (Smith, Rana) (Entered: 09/25/2008)
09/25/2008	91	ORDER granting 89 MOTION Issuance of Subpoenas filed by USA. So Ordered by Judge William E Smith on 9/23/2008. (Geile, Wendy) (Entered: 09/25/2008)

DATE	#	DOCKET TEXT
09/25/2008	92	TRANSCRIPT REQUEST by USA (Donnelly, Terrence) (Entered: 09/25/2008)
09/29/2008		Minute Entry for proceedings held before Judge William E Smith: Jury Trial (DAY 5) as to Southern Union Company held on 9/29/2008. (Donnelly, Chabot, Cassidy, Tarantino, Petros, Fetterman, Rocha) All counsel of record present. Jury in; court addresses. W-13 continued from 9/25/2008. Two witnesses sworn. Twelve exhibits entered FULL; five exhibits for ID only. Jury out; discussion out of jury presence. Jury Trial to continue Tuesday, 9/30/2008 at 9:00 am. (Court Reporter Anne Clayton in Courtroom 2 at 9:34 am.) (Smith, Rana) (Entered: 09/29/2008)
09/29/2008	93	TRANSCRIPT REQUEST for proceedings held on September 18, 2008 before Judge Smith. (Petros, Gerald) (Entered: 09/29/2008)
09/29/2008	94	RESPONSE to Motion by USA as to Southern Union Company re 79 MOTION to Exclude *Federal Enforcement of Rhode Island State Regulations Concerning Conditionally Exempt Small Quantity Generators* (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4

DATE	#	DOCKET TEXT
		Exhibit 4, # 5 Exhibit 5) (Donnelly, Terrence) (Entered: 09/29/2008)
09/29/2008	95	REPLY TO RESPONSE to Motion by Southern Union Company re 79 MOTION to Exclude *Federal Enforcement of Rhode Island State Regulations Concerning Conditionally Exempt Small Quantity Generators* (Attachments: # 1 Exhibit A) (Petros, Gerald) (Entered: 09/29/2008)
09/30/2008		Minute Entry for proceedings held before Judge William E Smith: Jury TriaL (DAY 6) as to Southern Union Company held on 9/30/2008. (Donnelly, Chabot, Cassidy, Tarantino, Petros, Fetterman, Rocha) All counsel of record present. Jury in; court addresses. W-15 continued from 9/29/2008. Jury out; discussion out of jury presence. Jury in. Seven exhibits entered FULL. Jury dismissed for the day. Jury Trial to continue Wednesday, 10/1/2008 at 9:00 am. (Court Reporter Anne Clayton in Courtroom 2 at 9:22 am.) (Smith, Rana) (Entered: 09/30/2008)
10/01/2008		Minute Entry for proceedings held before Judge William E Smith: Jury Trial (DAY 7) as to Southern Union Company held on 10/1/2008. (Donnelly, Chabot, Cassidy, Tarantino, Petros, Fetterman, Rocha) All counsel of record present. Jury in; court

DATE	#	DOCKET TEXT
		addresses. W-15 continued from 9/30/2008. Jury out; discussion out of jury presence. Jury in. Two witnesses sworn. Three exhibits entered FULL. Jury dismissed for the day. Jury Trial to continue Thursday, 10/2/2008 at 9:00 am. (Court Reporter Anne Clayton in Courtroom 2 at 9:17 am.) (Smith, Rana) (Entered: 10/01/2008)
10/02/2008		Minute Entry for proceedings held before Judge William E Smith: Jury Trial (DAY 8) as to Southern Union Company held on 10/2/2008. (Donnelly, Chabot, Cassidy, Tarantino, Petros, Fetterman, Rocha) All counsel of record present. Jury in; court addresses. W-17 continued from 10/1/2008. Jury out; discussion out of jury presence. Jury in. Three witnesses sworn. Eighteen exhibits entered FULL; one exhibit for ID only. Jury dismissed for the day; discussion out of jury presence. Jury Trial to continue Friday, 10/3/2008 at 9:00 am. (Court Reporter Anne Clayton in Courtroom 2 at 9:50 am.) (Smith, Rana) (Entered: 10/02/2008)
10/02/2008	96	MOTION to Strike *and For Jury Instruction* by USA as to Southern Union Company. (Donnelly, Terrence) (Entered: 10/02/2008)

DATE	#	DOCKET TEXT
10/03/2008		Minute Entry for proceedings held before Judge William E Smith: granting 96 Motion to Strike as to Southern Union Company (1); Jury Trial (DAY 9) as to Southern Union Company held on 10/3/2008. Donnelly, Chabot, Cassidy, Tarantino, Petros, Fetterman, Rocha) All counsel of record present. Discussion out of Jury presence. Court addresses. Arguments heard as to 96 MOTION to Strike and For Jury Instruction by USA as to Southern Union Company; Court grants for the reasons stated in open court. Jury in; Court instructs jurors re: the testimony of W-21. W-21 continued from 10/2/2008. Jury out; discussion out of jury presence. Jury in. One witness sworn. Twelve exhibits entered FULL; two exhibits for ID only. Jury dismissed for the day. Discussion out of Jury presence. Government addresses proposed oral stipulation re: paragraphs in the Indictment. Defense agrees to the stipulation. Government to prepare written stipulation to submit to the Court on Monday. Jury Trial to continue Monday, 10/6/2008 at 9:00 am. (Court Reporter Anne Clayton in Courtroom 2 at 9:03 am.) (Smith, Rana) (Entered: 10/06/2008)

DATE	#	DOCKET TEXT
10/06/2008		Minute Entry for proceedings held before Judge William E Smith: Jury Trial (DAY 10) as to Southern Union Company held on 10/6/2008. Donnelly, Chabot, Cassidy, Tarantino, Petros, Fetterman, Rocha) All counsel of record present. Jury in. Six witnesses sworn. Jury out; discussion out of jury presence. Jury in. Twenty-three exhibits entered FULL; one exhibit previously marked as ID on 9/24/08, entered FULL. Court addresses Jurors; Jury dismissed for the day. Discussion out of Jury presence. Arguments heard as to the admittance of a Government exhibit; Court defers ruling. Arguments heard as to Defendant's Oral Rule 29 Motion; Court takes Motion under advisement. Defense Counsel makes an Oral Motion for a mistrial; Court denies for reasons stated in open court. Jury Trial to continue Tuesday, 10/7/2008 at 9:00 am. (Court Reporter Anne Clayton in Courtroom 2 at 9:16 am.) (Smith, Rana) (Entered: 10/06/2008)
10/07/2008		NOTICE OF HEARING as to Southern Union Company Daubert Hearing set for 10/7/2008 at 2:00 PM in Courtroom 2 before Judge William E Smith. (Geile, Wendy) (Entered: 10/07/2008)

DATE	#	DOCKET TEXT
10/07/2008		Minute Entry for proceedings held before Judge William E Smith: Jury Trial (DAY 11) as to Southern Union Company held on 10/7/2008. Donnelly, Chabot, Cassidy, Tarantino, Petros, Fetterman, Rocha) All counsel of record present. Court addresses out of Jury presence; continued arguments heard as to the admittance of a Government exhibit; Court rules exhibit will not be admitted. Court addresses re: Defendants Oral Rule 29 Motions; Court reserves ruling on all three Rule 29 Motions. Jury in. Court addresses Jurors. Government rests. Two witnesses sworn. One exhibit entered FULL. Court instructs jurors re: hazardous waste issue as to witness testimony. Jury out; discussion out of Jury presence; one exhibit admitted for ID only. Defense counsel objects to the Courts Jury instruction re: hazardous waste issue as to witness testimony; Defense requests a mistrial; Court denies Oral Motion for Mistrial. Jury in; Court addresses Jurors; Jury dismissed for the day. Jury Trial to continue Wednesday, 10/8/2008 at 9:00 am. (Court Reporter Anne Clayton in Courtroom 2 at 9:02 am.) (Smith, Rana) (Entered: 10/07/2008)

DATE	#	DOCKET TEXT
10/07/2008		Minute Entry for proceedings held before Judge William E Smith: granting 68 Motion in Limine as to Southern Union Company (1); Daubert Hearing as to Southern Union Company held on 10/7/2008. (Donnelly, Chabot, Cassidy, Tarantino, Petros, Fetterman, Rocha) All counsel of record present. Court addresses. One witness sworn. Defense counsel and Government rest on their papers with respect to argument re: 68 Governments Motion In Limine to Exclude Testimony; Court grants for reasons stated in open court. (Court Reporter Karen Wischnowsky in Courtroom 2 at 2:24 pm.) (Smith, Rana) (Entered: 10/08/2008)
10/07/2008	97	WITNESS AND EXHIBIT LIST re: Daubert Hearing as to Southern Union Company. (Smith, Rana) (Entered: 10/08/2008)
10/08/2008		Minute Entry for proceedings held before Judge William E Smith: Jury Trial (DAY 12) as to Southern Union Company held on 10/8/2008. (Donnelly, Chabot, Cassidy, Tarantino, Petros, Fetterman, Rocha) All counsel of record present. Jury in. Court addresses Jurors. One exhibit entered FULL. Defense rests. Government does not have a rebuttal case. Jurors dismissed for the day to

DATE	#	DOCKET TEXT
		return on Tuesday, for closing arguments and Jury charge; Court instructs Jurors. Discussion out of Jury presence. Defense counsel renews their Oral Rule 29 Motions; further arguments heard. Defense counsel requests the Court dismiss all three counts. Court takes Oral Motions under advisement. Charge conference scheduled for Thursday, 10/9/2008 at 9:00 am. Jury Trial to continue Tuesday, 10/14/2008 at 9:00 am. (Court Reporter Karen Wischnowsky in Courtroom 2 at 9:13 am.) (Smith, Rana) (Entered: 10/08/2008)
10/10/2008		ORAL ORDER denying 79 Motion to Exclude as to Southern Union Company (1). So Ordered by Judge William E Smith on 10/9/2008. (Smith, Rana) (Entered: 10/10/2008)
10/10/2008		ORAL ORDER granting 36 MOTION to Strike Surplusage From The Indictment WITH SUPPORTING MEMO by Southern Union Company. Government to file redacted Indictment. So Ordered by Judge William E Smith on 10/9/2008. (Smith, Rana) (Entered: 10/10/2008)
10/14/2008		Minute Entry for proceedings held before Judge William E Smith: Jury Trial as to Southern Union Company held on 10/14/2008. (Day 13)

DATE	#	DOCKET TEXT
		Terrence Donnelly, Dianne Chabot and Kevin Cassidy for Government. John Tarantino, Gerald Petros, Pat Rocha and Daniel Fetterman for Defendant. All counsel of record present. Objections to the jury charge placed on the record. Jury in. Government presents closing arguments. Defense counsel presents closing arguments. Government presents rebuttal closing arguments. Court charges jury. Marshal sworn. Jury out to deliberate. Jury In. Jury released for the day. Jury deliberations to continue 10/15/2008 at 9:00 am. (Court Reporter Anne Clayton/ Karen Wischnowsky in Courtroom 2 at 8:37 am.) (Geile, Wendy) (Entered: 10/14/2008)
10/15/2008		Minute Entry for proceedings held before Judge William E Smith: Jury Trial as to Southern Union Company held on 10/15/2008. (Day 14) Terrence Donnelly, Dianne Chabot and Kevin Cassidy for Government. John Tarantino, Gerald Petros, Pat Rocha and Daniel Fetterman for Defendant. All counsel of record present. Jurors continue deliberations. Court addresses jurors questions. Jury returns with a verdict: Jurors find the defendant Guilty as to count I of the Indictment; Jurors find the defendant Not Guilty as to

DATE	#	DOCKET TEXT
		counts II and III of the Indictment. Sentencing in this matter scheduled for 2/20/2009 at 2:00 pm. (Court Reporter Anne Clayton in Courtroom 2 at 9:08 am.) (Geile, Wendy) (Entered: 10/15/2008)
10/15/2008	98	JURY VERDICT as to Southern Union Company (1) Guilty on Count 1 Southern Union Company (1) Not Guilty on Count 2,3. (Geile, Wendy) (Entered: 10/15/2008)
10/15/2008		NOTICE OF HEARING DEFENDANT REQUEST as to Southern Union Company Sentencing set for 2/20/2009 at 2:00 PM in Courtroom 2 before Judge William E Smith. (Geile, Wendy) (Entered: 10/15/2008)
10/15/2008	99	EXHIBIT AND WITNESS LIST re: Jury Trial as to Southern Union Company. (Smith, Rana) (Entered: 10/17/2008)
10/20/2008	100	MOTION to Extend Time Within Which to File Post-Trial Motions by Southern Union Company. (Tarantino, John) (Entered: 10/20/2008)
10/21/2008		Motion Forwarded to Chambers: 100 MOTION to Extend Time Within Which to File Post-Trial Motions (Geile, Wendy) (Entered: 10/21/2008)

DATE	#	DOCKET TEXT
10/22/2008		TEXT ORDER granting 100 Motion to Extend Time as to Southern Union Company (1). Defendant shall have up to and including November 14, 2008 to file post-trial motions. So Ordered by Judge William E Smith on 10/22/2008. (Geile, Wendy) (Entered: 10/22/2008)
10/27/2008	101	TRANSCRIPT of Motions as to Southern Union Company held on June 11, 2008 before Judge William E. Smith. Court Reporter/Transcriber Anne M. Clayton, Telephone number (401) 255-2310. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 11/17/2008. Redacted Transcript Deadline set for 11/28/2008. Release of Transcript Restriction set for 1/25/2009. (Clayton, Anne) (Entered: 10/27/2008)
10/27/2008	102	TRANSCRIPT of Chambers Jury Impanelment as to Southern Union Company held on September 3, 2008 before Judge William E. Smith. Court Reporter/Transcriber Anne M. Clayton, Telephone number (401) 255-2310. Transcript may be viewed at the court public ter-

DATE	#	DOCKET TEXT
		minal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 11/17/2008. Redacted Transcript Deadline set for 11/28/2008. Release of Transcript Restriction set for 1/25/2009. (Clayton, Anne) (Entered: 10/27/2008)
10/27/2008	103	TRANSCRIPT of Jury Impanelment as to Southern Union Company held on September 3, 2008 before Judge William E. Smith. Court Reporter/Transcriber Anne M. Clayton, Telephone number (401) 255-2310. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/ Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 11/17/2008. Redacted Transcript Deadline set for 11/28/2008. Release of Transcript Restriction set for 1/25/2009. (Clayton, Anne) (Entered: 10/27/2008)
10/27/2008	104	TRANSCRIPT of Motion to Quash as to Southern Union Company held on September 18, 2008 before Judge William E. Smith. Court

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		Reporter/Transcriber Anne M. Clayton, Telephone number (401) 255-2310. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 11/17/2008. Redacted Transcript Deadline set for 11/28/2008. Release of Transcript Restriction set for 1/25/2009. (Clayton, Anne) (Entered: 10/27/2008)
10/27/2008	105	TRANSCRIPT of Jury Trial Volume 1 as to Southern Union Company held on September 22, 2008 before Judge William E. Smith. Court Reporter/Transcriber Anne M. Clayton, Telephone number (401) 255-2310. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 11/17/2008. Redacted Transcript Deadline set for 11/28/2008. Release of Transcript Restriction set for 1/25/2009. (Clayton, Anne) (Entered: 10/27/2008)

DATE	#	DOCKET TEXT
10/27/2008	106	TRANSCRIPT of Jury Trial Volume 2 as to Southern Union Company held on September 23, 2008 before Judge William E. Smith. Court Reporter/Transcriber Anne M. Clayton, Telephone number (401) 255-2310. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/ Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 11/17/2008. Redacted Transcript Deadline set for 11/28/2008. Release of Transcript Restriction set for 1/25/2009. (Clayton, Anne) (Entered: 10/27/2008)
10/27/2008	107	TRANSCRIPT of Jury Trial Volume 3 as to Southern Union Company held on September 24, 2008 before Judge William E. Smith. Court Reporter/Transcriber Anne M. Clayton, Telephone number (401) 255-2310. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/ Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 11/17/2008. Redacted Transcript Deadline set for 11/28/2008. Release of Transcript Restriction

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		set for 1/25/2009. (Clayton, Anne) (Entered: 10/27/2008)
10/27/2008	108	TRANSCRIPT of Jury Trial Volume 4 as to Southern Union Company held on September 25, 2008 before Judge William E. Smith. Court Reporter/Transcriber Anne M. Clayton, Telephone number (401) 255-2310. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/ Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 11/17/2008. Redacted Transcript Deadline set for 11/28/2008. Release of Transcript Restriction set for 1/25/2009. (Clayton, Anne) (Entered: 10/27/2008)
10/27/2008	109	TRANSCRIPT of Jury Trial Volume 5 as to Southern Union Company held on September 29, 2008 before Judge William E. Smith. Court Reporter/Transcriber Anne M. Clayton, Telephone number (401) 255-2310. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/ Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request

DATE	#	DOCKET TEXT
		due 11/17/2008. Redacted Transcript Deadline set for 11/28/2008. Release of Transcript Restriction set for 1/25/2009. (Clayton, Anne) (Entered: 10/27/2008)
10/27/2008	110	TRANSCRIPT of Empanelment of Alternate Jurors; Motions in Limine Proceedings as to Southern Union Company held on 9/19/08 before Judge Smith. Court Reporter/ Transcriber Debra Lajoie, Telephone number 401-952-2731. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/ Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 11/17/2008. Redacted Transcript Deadline set for 11/28/2008. Release of Transcript Restriction set for 1/25/2009. (Lajoie, Debra) (Entered: 10/27/2008)
10/27/2008	111	TRANSCRIPT of Jury Trial Day 6 as to Southern Union Company held on September 30, 2008 before Judge William E. Smith. Court Reporter/Transcriber Anne M. Clayton, Telephone number (401) 255-2310. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/

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		Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 11/17/2008. Redacted Transcript Deadline set for 11/28/2008. Release of Transcript Restriction set for 1/25/2009. (Clayton, Anne) (Entered: 10/27/2008)
10/27/2008	112	TRANSCRIPT of Jury Trial Day 7 as to Southern Union Company held on October 1, 2008 before Judge William E. Smith. Court Reporter/ Transcriber Anne M. Clayton, Telephone number (401) 255-2310. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/ Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 11/17/2008. Redacted Transcript Deadline set for 11/28/2008. Release of Transcript Restriction set for 1/25/2009. (Clayton, Anne) (Entered: 10/27/2008)
10/27/2008	113	TRANSCRIPT of Jury Trial Volume 8 as to Southern Union Company held on October 2, 2008 before Judge William E. Smith. Court Reporter/Transcriber Anne M. Clayton, Telephone number (401) 255-

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		2310. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/ Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 11/17/2008. Redacted Transcript Deadline set for 11/28/2008. Release of Transcript Restriction set for 1/25/2009. (Clayton, Anne) (Entered: 10/27/2008)
10/27/2008	114	TRANSCRIPT of Jury Trial Volume 9 as to Southern Union Company held on October 3, 2008 before Judge William E. Smith. Court Reporter/Transcriber Anne M. Clayton, Telephone number (401) 255-2310. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/ Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 11/17/2008. Redacted Transcript Deadline set for 11/28/2008. Release of Transcript Restriction set for 1/25/2009. (Clayton, Anne) (Entered: 10/27/2008)
10/27/2008	115	TRANSCRIPT of Jury Trial Volume 10 as to Southern Union Company held on October 6, 2008 before

DATE	#	DOCKET TEXT
		Judge William E. Smith. Court Reporter/Transcriber Anne M. Clayton, Telephone number (401) 255-2310. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/ Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 11/17/2008. Redacted Transcript Deadline set for 11/28/2008. Release of Transcript Restriction set for 1/25/2009. (Clayton, Anne) (Entered: 10/27/2008)
10/27/2008	116	TRANSCRIPT of Rule 29 Motion as to Southern Union Company held on October 6, 2008 before Judge William E. Smith. Court Reporter/ Transcriber Anne M. Clayton, Telephone number (401) 255-2310. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/ Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 11/17/2008. Redacted Transcript Deadline set for 11/28/2008. Release of Transcript Restriction set for 1/25/2009. (Clayton, Anne) (Entered: 10/27/2008)

DATE	#	DOCKET TEXT
10/27/2008	117	**TRANSCRIPT of Jury Trial Volume 11 as to Southern Union Company held on October 7, 2008 before Judge William E. Smith. Court Reporter/Transcriber Anne M. Clayton, Telephone number (401) 255-2310. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/ Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 11/17/2008. Redacted Transcript Deadline set for 11/28/2008. Release of Transcript Restriction set for 1/25/2009.** (Clayton, Anne) **(Entered: 10/27/2008)**
10/27/2008	118	**TRANSCRIPT of Chambers Charge Conference as to Southern Union Company held on October 9, 2008 before Judge William E. Smith. Court Reporter/Transcriber Anne M. Clayton, Telephone number (401) 255-2310. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/ Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 11/17/2008. Redacted Transcript Deadline set for 11/28/2008.** Release of Transcript Restriction

DATE	#	DOCKET TEXT
		set for 1/25/2009. (Clayton, Anne) (Entered: 10/27/2008)
10/27/2008	119	TRANSCRIPT of Jury Trial Volume 13 as to Southern Union Company held on October 14, 2008 before Judge William E. Smith. Court Reporter/Transcriber Anne M. Clayton, Telephone number (401) 255-2310. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/ Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 11/17/2008. Redacted Transcript Deadline set for 11/28/2008. Release of Transcript Restriction set for 1/25/2009. (Clayton, Anne) (Entered: 10/27/2008)
10/27/2008	120	TRANSCRIPT of Jury Trial Volume 14 as to Southern Union Company held on October 15, 2008 before Judge William E. Smith. Court Reporter/Transcriber Anne M. Clayton, Telephone number (401) 255-2310. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/ Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request

DATE	#	DOCKET TEXT
		due 11/17/2008. Redacted Transcript Deadline set for 11/28/2008. Release of Transcript Restriction set for 1/25/2009. (Clayton, Anne) (Entered: 10/27/2008)
10/27/2008	121	TRANSCRIPT of Daubert Hearing as to Southern Union Company held on October 7, 2008, before Judge William E. Smith. Court Reporter Karen Wischnowsky, Telephone number 401-351-8311. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 11/17/2008. Redacted Transcript Deadline set for 11/28/2008. Release of Transcript Restriction set for 1/25/2009. (Wischnowsky, Karen) (Entered: 10/27/2008)
10/27/2008	122	TRANSCRIPT of Jury Trial as to Southern Union Company held on October 8, 2008, before Judge William E. Smith. Court Reporter Karen Wischnowsky, Telephone number 401-351-8311. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restric-

DATE	#	DOCKET TEXT
		tion. After that date it may be obtained through PACER Redaction Request due 11/17/2008. Redacted Transcript Deadline set for 11/28/2008. Release of Transcript Restriction set for 1/25/2009. (Wischnowsky, Karen) (Entered: 10/27/2008)
11/05/2008	123	Assented MOTION to Extend Time Within Which to File Post-Trial Motions by Southern Union Company. (Petros, Gerald) (Entered: 11/05/2008)
11/06/2008		Motion Forwarded to Chambers: 123 Assented MOTION to Extend Time Within Which to File Post-Trial Motions (Geile, Wendy) (Entered: 11/06/2008)
11/12/2008		TEXT ORDER granting 123 Motion to Extend Time as to Southern Union Company (1). The defendant shall have up to and including 12/1/2008 to file post-trial motions. So Ordered by Judge William E Smith on 11/12/2008. (Geile, Wendy) (Entered: 11/12/2008)
12/01/2008	124	MOTION for New Trial WITH SUPPORTING MEMO by Southern Union Company. (Attachments: # 1 Exhibit Southern Union's proposed jury instructions on CESQG) (Tarantino, John) (Entered: 12/01/2008)

DATE	#	DOCKET TEXT
12/01/2008	125	MOTION for Judgment of Acquittal on Count I of the Indictment with supporting memorandum by Southern Union Company. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K) (Petros, Gerald) (Entered: 12/01/2008)
12/10/2008	126	First MOTION to Extend Time to Extend Time to File Responses to the Defendant's Post-trial Motions by USA as to Southern Union Company. (Donnelly, Terrence) (Entered: 12/10/2008)
12/11/2008		Motion Forwarded to Chambers: 126 First MOTION to Extend Time to Extend Time to File Responses to the Defendant's Post-trial Motions (Geile, Wendy) (Entered: 12/11/2008)
12/12/2008		TEXT ORDER granting 126 Motion to Extend Time as to Southern Union Company (1). The Government shall have up to and including 1/16/2009 to file its responses to Defendant's Post-Trial Motions. So Ordered by Judge William E Smith on 12/12/2008. (Geile, Wendy) (Entered: 12/12/2008)
01/15/2009	127	RESPONSE to Motion by USA as to Southern Union Company re 125

DATE	#	DOCKET TEXT
		MOTION for Judgment of Acquittal on Count I of the Indictment (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8) (Donnelly, Terrence) (Entered: 01/15/2009)
01/15/2009	128	RESPONSE to Motion by USA as to Southern Union Company re 124 MOTION for New Trial (Donnelly, Terrence) (Entered: 01/15/2009)
01/16/2009		Motions Forwarded to Chambers: 125 MOTION for Judgment of Acquittal on Count I of the Indictment, 124 MOTION for New Trial (Geile, Wendy) (Entered: 01/16/2009)
01/21/2009		REVISED NOTICE OF HEARING DEFENDANT REQUEST as to Southern Union Company Sentencing RESET for 5/7/2009 at 10:00 AM in Courtroom 2 before Judge William E Smith. (Geile, Wendy) (Entered: 01/21/2009)
01/21/2009		SECOND REVISED NOTICE OF HEARING DEFENDANT REQUEST as to Southern Union Company Sentencing RESET for 5/7/2009 at 2:00 PM in Courtroom 2 before Judge William E Smith. (Geile, Wendy) (Entered: 01/21/2009)
01/22/2009	129	Assented MOTION for Leave to File *Reply Memorandum in Support of*

DATE	#	DOCKET TEXT
		Defendant's Renewed Motion for Judgment of Acquittal on the Small Quantity Generator Defense and Motion for New Trial by Southern Union Company. (Petros, Gerald) (Entered: 01/22/2009)
01/23/2009		Motion Forwarded to Chambers: 129 Assented MOTION for Leave to File *Reply Memorandum in Support of Defendant's Renewed Motion for Judgment of Acquittal on the Small Quantity Generator Defense and Motion for New Trial* (Geile, Wendy) (Entered: 01/23/2009)
01/27/2009		NOTICE re 102 Transcript, 103 Transcript, 110 Transcript. In accordance with the Judicial Conference Privacy Policy as it relates to juror information, these transcripts will remain restricted. (Farrell Pletcher, Paula) (Entered: 01/27/2009)
01/27/2009		TEXT ORDER granting 129 Motion for Leave to File as to Southern Union Company (1). So Ordered by Judge William E Smith on 1/27/2009. (Geile, Wendy) (Entered: 01/27/2009)
01/28/2009	130	TRANSCRIPT REQUEST by USA for proceedings held on 1/17/08 before Judge Ernest C. Torres. (Lockhart, Donald) (Entered: 01/28/2009)

DATE	#	DOCKET TEXT
01/28/2009	131	TRANSCRIPT REQUEST by USA for proceedings held on 4/8/08 before Judge David L. Martin. (Lockhart, Donald) (Entered: 01/28/2009)
01/29/2009		Remark as to Southern Union Company: Transcript Request 131, CD and docket forwarded to Maryann Young, Court Reporter via regular mail (Noel, Jeannine) (Entered: 01/29/2009)
02/12/2009	132	REPLY TO RESPONSE to Motion by Southern Union Company re 124 MOTION for New Trial (Tarantino, John) (Entered: 02/12/2009)
02/13/2009	133	REPLY TO RESPONSE to Motion by Southern Union Company re 125 MOTION for Judgment of Acquittal on Count I of the Indictment (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C) (Petros, Gerald) (Entered: 02/13/2009)
03/11/2009		Remark as to Southern Union Company: Transcript request 131, CD and docket forwarded to Joseph Fontes, Court Reporter, via Fedex (Noel, Jeannine) (Entered: 03/11/2009)
04/17/2009		NOTICE OF HEARING as to Southern Union Company. Status Conference set for 4/24/2009 at 11:00 AM in Judge Smith Chambers

DATE	#	DOCKET TEXT
		– before Judge William E Smith. (Geile, Wendy) (Entered: 04/17/2009)
04/21/2009		REVISED NOTICE OF HEARING as to Southern Union Company. Status Conference RESET for 4/24/2009 at 11:30 AM in Judge Smith Chambers – before Judge William E Smith. (Geile, Wendy) (Entered: 04/21/2009)
04/23/2009		SECOND REVISED NOTICE OF HEARING as to Southern Union Company. Status Conference RESET for 4/24/2009 at 11:00 AM in Judge Smith Chambers – before Judge William E Smith. (Geile, Wendy) (Entered: 04/23/2009)
04/24/2009		Minute Entry for proceedings held before Judge William E Smith: Status Conference as to Southern Union Company held on 4/24/2009. Terrence Donnelly for Government. John Tarantino and Daniel Fetterman (via telephone) for Defendant. All counsel of record present. (Geile, Wendy) (Entered: 04/24/2009)
04/24/2009		REVISED NOTICE OF HEARING DEFENDANT REQUEST as to Southern Union Company. Sentencing RESET for 6/25/2009 at 2:30 PM in Courtroom 2 before Judge William E Smith. (Geile, Wendy) (Entered: 04/24/2009)

DATE	#	DOCKET TEXT
05/12/2009	134	SENTENCING MEMORANDUM by Southern Union Company (Tarantino, John) (Entered: 05/12/2009)
05/22/2009	135	First MOTION to Extend Time Time to File Response by USA as to Southern Union Company. (Donnelly, Terrence) (Entered: 05/22/2009)
05/22/2009		Motion Forwarded to Chambers: 135 First MOTION to Extend Time Time [sic] to File Response (Geile, Wendy) (Entered: 05/22/2009)
05/26/2009		TEXT ORDER granting 135 Motion to Extend Time as to Southern Union Company (1). So Ordered by Judge William E Smith on 5/26/2009. (Geile, Wendy) (Entered: 05/26/2009)
05/28/2009		NOTICE OF HEARING as to Southern Union Company: Telephone Conference *scheduled for 6/1/2009 at 3:30 PM in Judge Smith Chambers* before Judge William E. Smith; this office will initiate the call; all counsel attending should provide telephone numbers to the clerk as soon as possible. (Jackson, Ryan) (Entered: 05/28/2009)
06/01/2009	136	RESPONSE in Opposition by USA as to Southern Union Company *Memorandum of Law with Respect to the Maximum Possible Sentencing*

DATE	#	DOCKET TEXT
		Fine (Donnelly, Terrence) (Entered: 06/01/2009)
06/01/2009		Minute Entry for proceedings held before Judge William E Smith: Telephone Conference as to Southern Union Company held on 6/1/2009; Counsel present on teleconference: John Tarantino, Gerald Petros, Dan Fetterman, David Ross, Seth Davis; Terrence Donnelly, Donald Lockhart, Kevin Cassidy, Colin Black (Jackson, Ryan) (Entered: 06/01/2009)
06/16/2009	137	SUPPLEMENTAL MEMORANDUM in support of 134 Sentencing Memorandum (Tarantino, John) (Entered: 06/16/2009)
06/19/2009		CANCELLATION NOTICE OF HEARING DEFENDANT REQUEST as to Southern Union Company: Sentencing *previously scheduled for 6/25/2009 at 2:30 PM in Courtroom 2* before Judge William E. Smith is hereby CANCELLED; the sentencing will be re-scheduled at a later date. (Jackson, Ryan) (Entered: 06/19/2009)
07/09/2009	138	PRELIMINARY SENTENCING MEMORANDUM as to Southern Union Company. So Ordered by Judge William E. Smith on 7/9/09. (Jackson, Ryan) (Entered: 07/09/2009)

DATE	#	DOCKET TEXT
07/23/2009	139	DECISION AND ORDER denying 124 Motion for New Trial as to Southern Union Company (1); denying 125 Motion for Judgment of Acquittal on Count I of the Indictment [sic] as to Southern Union Company (1). So Ordered by Judge William E. Smith on 7/22/09. (Jackson, Ryan) (Entered: 07/23/2009)
07/24/2009		NOTICE OF HEARING as to Southern Union Company Status Conference *scheduled for 7/31/2009 at 2:00 PM in Judge Smith Chambers* before Judge William E. Smith. (Jackson, Ryan) (Entered: 07/24/2009)
07/31/2009		Minute Entry for proceedings held before Judge William E Smith: In Chambers Conference as to Southern Union Company held on 7/31/2009. Terrence Donnelly and Kevin Cassidy for Government. John Tarantino, Gerald Petros, and Daniel Fetterman (via teleconference) for Defendant. (Smith, Rana) (Entered: 07/31/2009)
07/31/2009		NOTICE OF HEARING DEFENDANT REQUEST as to Southern Union Company Sentencing set for 10/2/2009 at 10:00 AM in Courtroom 2 before Judge William E. Smith. (Smith, Rana) (Entered: 07/31/2009)

DATE	#	DOCKET TEXT
09/11/2009	140	SENTENCING MEMORANDUM by Southern Union Company (Tarantino, John) (Entered: 09/11/2009)
09/11/2009	141	SENTENCING MEMORANDUM by USA as to Southern Union Company (Attachments: # 1 Exhibit 1 - Pawt. Fire Chief Letter to Court, # 2 Exhibit 2 - SEC Filings 2004-2006, # 3 Exhibit 3 - SEC Filings 2007-2009) (Donnelly, Terrence) (Entered: 09/11/2009)
10/01/2009	142	SENTENCING MEMORANDUM by USA as to Southern Union Company (Attachments: # 1 Exhibit 1 - Rhodia Judgment, # 2 Exhibit 2 - Exh. 240 Unredacted, # 3 Exhibit 3 - "Mistakes" Memo, # 4 Exhibit 4 - Wells Letter, # 5 Exhibit 5 - Varieur Elementary, # 6 Exhibit 6 - Shea HS, # 7 Exhibit 7 - Prov. Journal Stories) (Donnelly, Terrence) (Entered: 10/01/2009)
10/01/2009	143	SENTENCING MEMORANDUM by Southern Union Company (Attachments: # 1 Exhibit Summary chart of expenses for remediation and clean-up, # 2 Exhibit Relevant pages to 2004 10k, # 3 Exhibit Relevant page of 2004 RI FERC Report) (Tarantino, John) (Entered: 10/01/2009)

DATE	#	DOCKET TEXT
10/02/2009	144	TRANSCRIPT REQUEST for proceedings held on 10/2/2009 before Judge Smith. (Tarantino, John) (Entered: 10/02/2009)
10/02/2009		Minute Entry for proceedings held before Judge William E Smith: Sentencing held on 10/2/2009 for Southern Union Company (1), Count(s) 1. Terrence Donnelly, Kevin Cassidy, Diane Chabot, and Colin L. Black for Government. John Tarantino, Gerald Petros, Patricia Rocha, and Daniel Fetterman, for Defendant. Probation: Heather McLoughlin. All counsel of record present. Executive from Southern Union Company present. Court addresses. Defense counsel address the Court re: defendant's objection to the PSR. Court accepts PSR as drafted. Government addresses the Court as to sentence recommendation. Government requests the Defendant Deposit all Money ordered in the Judgment into the Court Registry. Defense Counsel addresses the court as to sentence recommendation. Defense makes an Oral Motion to Stay the Execution of the Judgment pending Appeal. Court grants Defense's Oral Motion to Stay on all penalties imposed; interest to begin accruing on the fine only. Court denies Govern-

DATE	#	DOCKET TEXT
		ment's request for Defendant to Deposit Money into the Court Registry. Company Executive declines allocution. Court imposes a term of 2 years probation as to Count 1 with special conditions. Special Assessment $400.00. Fine imposed in the amount of six million dollars ($6,000,000). Community Service obligation in the amount of twelve million dollars ($12,000,000) interest waived on the community service. Ten exhibits admitted full. (Court Reporter Anne Clayton in Courtroom 2 at 10:10 am.) (Smith, Rana) Modified on 10/5/2009 to add exhibits (Smith, Rana). (Entered: 10/05/2009)
10/02/2009	145	EXHIBIT LIST re: Sentencing as to Southern Union Company (Smith, Rana) (Entered: 10/05/2009)
10/02/2009	153	ORAL MOTION to Stay Execution of Judgment Pending Determination of Appeal by Southern Union Company. (Smith, Rana) (Entered: 10/16/2009)
10/07/2009	146	TRANSCRIPT REQUEST *US v. Southern Union Company CR07-134-S* by USA for proceedings held on 10/2/2009 before Judge William E. Smith. (Donnelly, Terrence) (Entered: 10/07/2009)

DATE	#	DOCKET TEXT
10/07/2009	147	JUDGMENT as to Southern Union Company (1), Count(s) 1, Court imposes a term of 2 years probation as to Count 1 with special conditions. Special Assessment $400.00. Fine imposed in the amount of six million dollars ($6,000,000). Community Service obligation in the amount of twelve million dollars ($12,000,000) interest waived on the community service. So Ordered by Judge William E Smith on 10/7/2009. (Smith, Rana) (Entered: 10/07/2009)
10/08/2009	148	NOTICE OF APPEAL by Southern Union Company Appeal Record due by 11/9/2009. (Tarantino, John) (Entered: 10/08/2009)
10/08/2009		USCA Appeal Fees received $455, receipt number 14670002039 as to Southern Union Company re 148 Notice of Appeal – Final Judgment (Smith, Rana) (Entered: 10/16/2009)
10/09/2009	149	APPEAL COVER SHEET Re: 148 Notice of Appeal – Final Judgment filed by Southern Union Company (Smith, Rana) (Entered: 10/09/2009)
10/09/2009	150	CLERK'S CERTIFICATE RE: Record on Appeal as to Southern Union Company re 148 Notice of Appeal – Final Judgment (Smith, Rana) (Entered: 10/09/2009)

DATE	#	DOCKET TEXT
10/09/2009	151	Certified and Transmitted Abbreviated Record on Appeal as to Southern Union Company to US Court of Appeals re 148 Notice of Appeal – Final Judgment (Smith, Rana) (Entered: 10/09/2009)
10/09/2009		USCA Case Number as to Southern Union Company 09-2403 for 148 Notice of Appeal – Final Judgment filed by Southern Union Company. (Smith, Rana) (Entered: 10/09/2009)
10/13/2009	152	TRANSCRIPT of Sentencing as to Southern Union Company held on October 2, 2009 before Judge William E. Smith. Court Reporter/ Transcriber Anne M. Clayton, Telephone number 401-255-2310. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/ Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 11/3/2009. Redacted Transcript Deadline set for 11/13/2009. Release of Transcript Restriction set for 1/11/2010. (Clayton, Anne) (Entered: 10/13/2009)
10/15/2009	154	ORDER granting 153 Oral Motion to Stay as to Southern Union Company (1). So Ordered by Judge Wil-

DATE	#	DOCKET TEXT
		liam E Smith on 10/15/2009. (Smith, Rana) (Entered: 10/16/2009)
10/19/2009	155	Transmitted Supplemental Record on Appeal as to Southern Union Company re 148 Notice of Appeal – Final Judgment (Smith, Rana) (Entered: 10/19/2009)
12/23/2010	156	SLIP OPINION of USCA (certified copy) as to Southern Union Company re 148 Notice of Appeal – Final Judgment (Smith, Rana) (Entered: 12/23/2010)
12/23/2010	157	JUDGMENT of USCA (certified copy) as to Southern Union Company re 148 Notice of Appeal – Final Judgment – Southern Union Company's conviction and the sentence and financial penalties imposed are affirmed. (Smith, Rana) (Entered: 12/23/2010)
02/28/2011	158	MANDATE of USCA (certified copy) as to Southern Union Company re 157 USCA Judgment (Smith, Rana) (Entered: 02/28/2011)
04/13/2011	159	STATUS REPORT by USA as to Southern Union Company (Lockhart, Donald) (Entered: 04/13/2011)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Court of Appeals Docket #: 09-2403
Docketed: 10/16/2009

UNITED STATES

v.

SOUTHERN UNION COMPANY

DOCKET ENTRIES

DATE	DOCKET TEXT
10/16/2009	CRIMINAL CASE docketed. Notice of appeal (doc. #148) filed by Appellant Southern Union Company. Opening forms sent. Docketing Statement due 10/30/2009. Transcript Report/Order form due 10/30/2009. Fee due 10/30/2009. Appearance form due 10/30/2009. [09-2403] (LB)
10/16/2009	Filing fee paid in the district court by Appellant Southern Union Co. on 10/16/2009. [09-2403] (DB)
10/19/2009	SUPPLEMENTAL Record filed. No. of Volumes: . 1, Comments: docket entry 154 (Order granting motion to stay, J. Smith, 10/15/09). [09-2403] (LB)

DATE	DOCKET TEXT
10/19/2009	NOTICE of appearance on behalf of Appellee US filed by Attorney Donald C. Lockhart. Certificate of service dated 10/19/2009. [09-2403] (DCL)
10/28/2009	NOTICE of appearance on behalf of Appellant Southern Union Co. filed by Attorney John A. Tarantino. Certificate of service dated 10/28/2009. [09-2403] (JAT)
10/28/2009	DOCKETING statement filed by Appellant Southern Union Co.. Certificate of service dated 10/28/2009. [09-2403] (JAT)
10/28/2009	NOTICE of appearance on behalf of Appellant Southern Union Co. filed by Attorney Patricia K. Rocha. Certificate of service dated 10/28/2009. [09-2403] (PKR)
10/28/2009	TRANSCRIPT report/order form filed by Appellant Southern Union Co. indicating all necessary transcripts have already been filed in district court. Certificate of service dated 10/28/2009. [09-2403] (PKR)
10/29/2009	BRIEFING schedule set. Brief due 12/08/2009 for Appellant Southern Union Co.. Appendix due 12/08/2009 for Appellant Southern Union Co.. Pursuant to F.R.A.P. 31(a), appellee's brief will be due 30 days following service of appellant's brief

DATE	DOCKET TEXT
	and appellant's reply brief will be due 14 days following service of appellee's brief. [09-2403] (LB)
10/29/2009	NOTICE of appearance on behalf of Appellant Southern Union Co. filed by Attorney Gerald J. Petros. Certificate of service dated 10/29/2009. [09-2403] (GJP)
11/09/2009	ASSENTED TO MOTION to extend time to file *brief* filed by Appellant Southern Union Co.. [09-2403] (GJP)
11/09/2009	ORDER granting motion to extend time to file brief and/or appendix filed by Appellant Southern Union Co. Brief due 02/08/2010 for Appellant Southern Union Co. Appendix due 02/08/2010 for Appellant Southern Union Co. We are disinclined to grant a request for further enlargement of this deadline. [09-2403] (LB)
11/24/2009	Mail returned as undeliverable to Attorney Charles A. Tamuleviz for Not Party Marc Viera. Copy of 11/09/09 order. Forwarded to DarrowEverett LLP, 1 Turks Head Place, Suuite 1200, Providence, RI 02903. 401-453-1200, 401-453-1201. ctamuleviz@darroweverett.com. [09-2403] (LB)

DATE	DOCKET TEXT
02/02/2010	ASSENTED TO MOTION to extend time to file *brief and appendix* filed by Appellant Southern Union Co. [09-2403]—[Edited 02/02/2010 by LB] CLERK'S NOTE: Docket entry was edited to modify the docket text. [09-2403] (GJP)
02/02/2010	ORDER granting motion to extend time to file brief and appendix filed by Appellant Southern Union Co. Brief due 02/16/2010 for Appellant Southern Union Co. Appendix due 02/16/2010 for Appellant Southern Union Co. [09-2403] (LB)
02/03/2010	JOINT MOTION *for Approval to Include Certain Government Documents in the Joint Appendix* filed by Appellant Southern Union Co. and Appellee US. Certificate of service dated 02/03/2010. [09-2403]—[Edited 02/04/2010 by LB] CLERK'S NOTE: Relief selection was incorrect. Correction made by clerk's office. No further action required. [09-2403] (GJP)
02/04/2010	ORDER The parties joint motion to file a supplemental appendix to include certain government documents is allowed. Supplemental appendix due 02/16/2010 for Appellant Southern Union Co. [09-2403] (LB)

DATE	DOCKET TEXT
02/16/2010	JOINT APPENDIX filed by Appellant Southern Union Co.. Number of volumes: 6. Number of copies: 5. Volume #6 filed Under Seal. Volume #4 only 4 copies. Certificate of service dated 02/16/2010. [09-2403] (BLC)
02/16/2010	BRIEF tendered by Appellant Southern Union Co.. Certificate of service dated 02/16/2010. [09-2403] (GJP)
02/16/2010	APPELLANT'S BRIEF filed by Appellant Southern Union Co.. Certificate of service dated 01/16/2010. Brief due 03/22/2010 for Appellee United States. Appellant is directed to submit nine paper copies identical to that of the electronically filed brief so that they are received by the court on or before 02/24/2010. [09-2403] (BLC)
02/16/2010	CORPORATE disclosure statement filed by Appellant Southern Union Co.. Certificate of service dated 02/16/2010. [09-2403] (BLC)
02/23/2010	Ten (10) paper copies of brief appellant/petitioner brief [5418099-2] submitted by Appellant Southern Union Co.. [09-2403] (BLC)
03/08/2010	MOTION to extend time to file *brief* filed by Appellee US. Certificate of

DATE	DOCKET TEXT
	service dated 03/08/2010. [09-2403] (DCL)
03/09/2010	ORDER granting motion to extend time to file brief filed by Appellee US. Brief due 04/12/2010 for Appellee United States. [09-2403] (LB)
03/26/2010	NOTICE of change of address filed by Attorney Dianne Chabot for Appellee US. New address: 5 Post Office Square, Suite 100, OES 04-02, Boston, MA 02109-3912. 617-918-1868. [09-2403] (LB)
04/07/2010	BRIEF tendered by Appellee US. Certificate of service dated 04/07/2010. [09-2403] (DCL)
04/07/2010	MOTION for leave to file oversized *Addendum* filed by Appellee US. Certificate of service dated 04/07/2010. [09-2403] (DCL)
04/07/2010	MOTION for leave to file supplemental appendix filed by Appellee US. Certificate of service dated 04/07/2010. [09-2403] (DCL)
04/08/2010	ORDER Appellee's motion for leave to file oversized addendum is allowed. [09-2403] (LB)
04/08/2010	ORDER Appellee United States' motion for leave to file supplemental appendix is granted. [09-2403] (LB)

DATE	DOCKET TEXT
04/08/2010	APPELLEE'S BRIEF filed by Appellee US. Certificate of service dated 04/07/2010. Reply brief due 04/26/2010 for Appellant Southern Union Co.. Appellee is directed to submit nine paper copies identical to that of the electronically filed brief so that they are received by the court on or before 04/15/2010. [09-2403]—[Edited 08/31/2010 by LB]. CLERK'S NOTE: Docket entry was edited to attach a document. [09-2403]—[Edited 08/31/2010 by LB]. CLERK'S NOTE: Docket entry was edited to modify the docket text. [09-2403] (BLC)
04/08/2010	TEN (10) paper copies of appellee/ respondent brief [5435177-2] submitted by Appellee US. [09-2403] (BLC)
04/08/2010	SUPPLEMENTAL APPENDIX filed by Appellee US. Number of volumes: 1. Number of copies: 5. Certificate of service dated 04/07/2010. [09-2403] (BLC)
04/09/2010	ASSENTED TO MOTION to extend time to file reply brief filed by Appellant Southern Union Co. Certificate of service dated 04/09/2010. [09-2403]—[Edited 04/09/2010 by LB] CLERK'S NOTE: Relief selection was incorrect. Correction made

DATE	DOCKET TEXT
	by clerk's office. No further action required. [09-2403] (GJP)
04/09/2010	ORDER granting motion to extend time to file reply brief filed by Appellant Southern Union Co. Reply brief due 06/10/2010 for Appellant Southern Union Co. No further extension of this deadline should be expected. [09-2403] (LB)
06/10/2010	BRIEF tendered by Appellant Southern Union Co.. Certificate of service dated 06/10/2010. [09-2403] (GJP)
06/10/2010	MOTION for leave to file supplemental appendix filed by Appellant Southern Union Co.. Certificate of service dated 06/10/2010. [09-2403] (GJP)
06/10/2010	REPLY BRIEF filed by Appellant Southern Union Co.. Certificate of service dated 06/10/2010. Appellant is directed to submit nine paper copies identical to that of the electronically filed brief so that they are received by the court on or before 06/18/2010. [09-2403] (BLC)
06/11/2010	PLEADING tendered: Supplemental Appendix (1 volume, 5 copies) filed by Appellant Southern Union Co. Certificate of service dated 06/10/2010. [09-2403] (BLC)

DATE	DOCKET TEXT
06/14/2010	ORDER Appellant's motion to file a supplemental appendix to the extent that the appendix contains material that is part of the record is granted. [09-2403] (LB)
06/14/2010	SUPPLEMENTAL APPENDIX filed by Appellant Southern Union Co. Number of volumes: 1. Number of copies: 5. Certificate of service dated 06/10/2010. [09-2403] (LB)
06/16/2010	NINE (9) paper copies of reply brief [5453187-2] submitted by Appellant Southern Union Co.. [09-2403] (BLC)
07/22/2010	CITATION of supplemental authorities pursuant to Fed. R. App. P. 28(j) filed by Appellant Southern Union Co.. Certificate of service dated 07/22/2010. [09-2403] (GJP)
08/30/2010	CITATION of supplemental authorities pursuant to Fed. R. App. P. 28(j) filed by Appellee US. Certificate of service dated 08/30/2010. [09-2403] (DCL)
08/31/2010	CASE calendared: 10/06/2010 Roger Williams University School of Law, Bristol, RI. Designation form due 09/14/2010. [09-2403] (LM)
09/03/2010	DESIGNATION of attorney presenting oral argument filed by Attorney Donald Campbell Lockhart for

DATE	DOCKET TEXT
	Appellee US. Certificate of service dated 09/03/2010. [09-2403] (DCL)
09/13/2010	DESIGNATION of attorney presenting oral argument filed by Attorney Gerald J. Petros for Appellant Southern Union Co.. Certificate of service dated 09/13/2010. [09-2403] (GJP)
09/13/2010	RESPONSE to citation of supplemental authorities pursuant to Fed. R. App. P. 28(j) [5474735-2] filed by Appellant Southern Union Co.. Certificate of service dated 09/13/2010. [09-2403]—[Edited 09/13/2010 by LB] CLERK'S NOTE: It appears the document was scanned rather than created by converting the original word processing document into a PDF file. THE FILER IS DIRECTED TO RE-FILE THE DOCUMENT WITHIN TWO DAYS. [09-2403] (GJP)
09/13/2010	RESPONSE to citation of supplemental authorities pursuant to Fed. R. App. P. 28(j) [5474735-2] filed by Appellant Southern Union Co.. Certificate of service dated 09/13/2010. [09-2403] (GJP)
09/30/2010	CITATION of supplemental authorities pursuant to Fed. R. App. P. 28(j) filed by Appellee US. Certifi-

DATE	DOCKET TEXT
	cate of service dated 09/30/2010. [09-2403] (DCL)
10/06/2010	CASE argued. Panel: Sandra L. Lynch, Chief Appellate Judge; Bruce M. Selya, Appellate Judge and Rogeriee Thompson, Appellate Judge. Arguing attorneys: Gerald J. Petros for Southern Union Co. and Donald Campbell Lockhart for US. [09-2403] (LM)
12/22/2010	OPINION issued by Sandra L. Lynch, Chief Appellate Judge; Bruce M. Selya, Appellate Judge and Rogeriee Thompson, Appellate Judge. Published. [09-2403] (LB)
12/22/2010	JUDGMENT entered by Sandra L. Lynch, Chief Appellate Judge; Bruce M. Selya, Appellate Judge and Rogeriee Thompson, Appellate Judge. 09-2403 Affirmed. [09-2403] (LB)
12/23/2010	ASSENTED TO MOTION to extend time to file a petition for rehearing filed by Appellant Southern Union Co.. Certificate of service dated 12/23/2010. [09-2403] (GJP)
12/28/2010	ORDER entered by Sandra L. Lynch, Chief Appellate Judge granting motion to extend time to file petition for rehearing en banc filed by Appellant Southern Union

DATE	DOCKET TEXT
	Co. Petition for rehearing due 02/04/2011. [09-2403] (CP)
01/04/2011	MOTION for leave to file oversized *Petition for Rehearing En Banc* filed by Appellant Southern Union Co.. Certificate of service dated 01/04/2011. [09-2403] (GJP)
01/05/2011	ORDER entered by Sandra L. Lynch, Chief Appellate Judge Appellant's motion for leave to file an oversized petition for rehearing en banc not to exceed twenty-five pages is allowed. [09-2403] (LB)
01/06/2011	ERRATA to opinion (published) [5513911-2] filed. [09-2403] (SBT)
02/04/2011	PETITION for rehearing en banc filed by Appellant Southern Union Co.. Certificate of service dated 02/04/2011. [09-2403] (GJP)
02/16/2011	ERRATA to opinion (published) [5513911-2] filed. [09-2403] (SBT)
02/17/2011	ORDER entered by Sandra L. Lynch, Chief Appellate Judge; Juan R. Torruella, Appellate Judge; Bruce M. Selya, Appellate Judge; Michael Boudin, Appellate Judge; Kermit V. Lipez, Appellate Judge; Jeffrey R. Howard, Appellate Judge and Rogeriee Thompson, Appellate Judge Pursuant to First Circuit Internal Operating Procedure X(C),

DATE	DOCKET TEXT
	the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied. [09-2403] (LB)
02/25/2011	MANDATE issued. [09-2403] (LB)
02/28/2011	Record returned to originating court: Docs. 154 and 155, [09-2403] (CC)
04/15/2011	U.S. SUPREME COURT ORDER entered. The application for an extension of time within which to file a petition for a writ of certiorari was granted. [09-2403] (LB)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Filed 10/16/07]

CR No. 07 134

In violation of 42 U.S.C. §6928(d)(2)(A);
42 U.S.C. §11045(b)(4); and 18 U.S.C. §2

UNITED STATES OF AMERICA

v.

SOUTHERN UNION COMPANY

INDICTMENT

INTRODUCTION

THE GRAND JURY CHARGES:

1. At all times relevant to this Indictment:

a. Defendant Southern Union Company ("Southern Union") was a Texas-based corporation, incorporated in Delaware, and engaged primarily in a national business of transporting and distributing natural gas.

b. Southern Union owned and operated several natural gas suppliers in Rhode Island and nearby Massachusetts, which collectively were known as the New England Gas Company ("NEGC").

c. As part of its property holdings in Rhode Island, Southern Union owned a facility at the end of

Tidewater Street along the Seekonk River in Pawtucket, Rhode Island (the "Tidewater facility"). The property consisted of several vacant buildings and two unused natural gas storage tanks.

Resource Conservation and Recovery Act (RCRA)

2. The Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §6901 *et seq.*, was enacted by Congress to address the nation's growing hazardous waste disposal problem caused primarily by industrial operations. The intent of RCRA is to protect human health and the environment by requiring the proper safe management of hazardous waste from the time that it is created until the time when it is disposed, and at all points in between.

3. RCRA regulates the generation, treatment, storage, transportation, and disposal of hazardous wastes by establishing a system of management standards, notifications, reports, manifests, and permits. This system of continually tracking hazardous waste is often referred to as "cradle to grave" management.

4. RCRA prohibits the treatment, storage or disposal of hazardous waste without a permit issued under RCRA. RCRA permits are issued by the Environmental Protection Agency ("EPA") or by an authorized state. Authorized state programs may impose more, but not less, stringent regulations than the federal program. At all times relevant to this indictment, the state of Rhode Island, through the Rhode Island Department of Environmental Management ("RIDEM"), was authorized to issue and enforce RCRA permits and regulations in the state of Rhode Island.

5. RCRA requires EPA to identify and list "hazardous wastes," 42 U.S.C. §6921. Wastes are hazardous either by virtue of their characteristics, for example, toxicity or ignitability, or by virtue of being specifically listed by EPA at 40 C.F.R. §261.20 *et seq*.

6. Mercury wastes are considered "toxic," and therefore hazardous, if they have a concentration of mercury equal to or greater than 0.2 milligrams per liter. 40 C.F.R. §261.24; Rhode Island Hazardous Waste Regulations ("RIHWR") §§ 2.02, 3.00.

7. Mercury that is a discarded commercial chemical product is listed as a hazardous waste at 40 C.F.R. §261.33(f), and is further designated as waste number U151. RIHWR §§ 2.02, 3.00.

The Mercury Regulator Program at the Tidewater Facility

8. Prior to the 1960s, many homes were equipped with gas meters using mercury-containing regulators. The regulators controlled the flow of gas to the household. Many older homes in the NEGC service area were outfitted with mercury-containing regulators.

9. From in or about June 2001 to January 2002, Southern Union engaged in a mercury regulator removal and reclamation program. Southern Union identified and removed regulators from its customers' homes, brought the regulators to the Tidewater facility, and contracted with an environmental services company to remove the mercury from the regulators at the Tidewater facility.

10. After removing the mercury from the regulators, Southern Union's contractor placed the mercury in steel flasks designed for its storage and

transportation. Southern Union's environmental coordinator for NEGC then shipped the mercury to a facility in Pennsylvania for distillation.

11. In or around January 2002, the contract with the environmental services company that removed the mercury from the regulators ceased.

12. On or about June 24, 2002, Southern Union's environmental coordinator for NEGC drafted a Request for Proposal ("RFP") to restart the mercury regulator removal and reclamation program at the Tidewater facility. The draft was reviewed and revised by Southern Union's environmental director in Texas, but a final version was never sent out to contractors for bids.

Mercury Storage at the Tidewater Facility

13. Throughout 2002, 2003 and 2004, Southern Union technicians continued to remove mercury containing regulators from customers' homes and stored them in one of the vacant buildings at the Tidewater facility.

14. On or about August 27, 2003, the Rhode Island-based environmental coordinator for Southern Union drafted a second RFP to solicit bids "for Waste Segregation, Packaging, Transportation and Disposal" of approximately 90 obsolete mercury containing regulators that were stored in plastic kiddie pools and on the floor of the vacant building, as well as several containers of waste liquid mercury stored in a locked, wooden cabinet in the same building. Southern Union never finalized the second RFP, and it was never sent out to contractors for bids.

15. The waste liquid mercury came from various sources known and unknown to the grand jury. For

instance, on or about September 19, 2002, a Southern Union employee transported approximately 10 pounds of loose mercury to the Tidewater facility. On or about September 24, 2002, a Southern Union employee transported a "half full jar of mercury" to the Tidewater facility "in a covered paint bucket." In another instance, on or about March 25, 2003, a plastic gallon-sized container of mercury was discovered in the locker of a deceased employee. Southern Union contracted with an environmental services company to transport the mercury from the locker to the Tidewater facility.

16. By in or about July 2004, Southern Union was storing approximately 165 obsolete mercury containing regulators in the vacant building at the Tidewater facility, along with the waste liquid mercury. The same Rhode Island-based environmental coordinator for Southern Union drafted a third RFP, again "for Waste Segregation, Packaging, Transportation and Disposal" of the mercury waste. As with the previous two draft RFPs, Southern Union never finalized the third RFP, and it was never sent out to contractors for bids.

17. At no time during the accumulation and storage at the Tidewater facility of the obsolete mercury containing regulators and the waste liquid mercury did Southern Union have a permit to store mercury waste there.

Lack of Security at the Tidewater Facility

18. At all times relevant to this indictment, the Tidewater facility was in various states of disrepair, which included gaps in the perimeter fencing, extensive graffiti on the vacant buildings, broken windows and doors, and overgrown vegetation.

19. On or about May 17, 2004, Southern Union's environmental coordinator for NEGC documented in his logbook that there had been evidence of attempted break-ins at the Tidewater facility.

20. After the attempted break-ins at the Tidewater facility, on or about May 20, 2004, at a safety committee meeting, a maintenance employee raised the safety concerns posed by the mercury storage at the Tidewater facility.

21. The same employee raised the issue again at a second safety committee meeting on or about June 17, 2004.

22. After Southern Union again failed to adequately address the safety concerns and after additional attempted break-ins, the employee raised the issue at a third safety committee meeting on or about September 16, 2004. Again, Southern Union did nothing to address the unsafe conditions at the Tidewater facility.

23. At no time relevant to this indictment were any signs posted at the Tidewater facility indicating that Southern Union was storing hazardous waste at one of the vacant buildings at that facility. There were also no signs within the mercury storage building warning of the presence of mercury containing regulators or the waste liquid mercury.

September 2004 Mercury Spill

24. In or about September 2004, three youths entered the Tidewater facility through an opening in the perimeter fence, and broke into the mercury storage building. Once there, the youths removed several containers of waste liquid mercury, some of which they broke and spilled within and outside of

the facility grounds. The youths brought some of the mercury back to a nearby apartment complex and into one of the homes there, and spread it around the apartment complex's grounds.

25. For approximately the next three weeks, puddles of mercury remained on the ground at the Tidewater facility and the doors to the mercury storage building remained open. The mercury spilled at the apartment complex also remained on the ground and accessible to the public.

26. On or about October 19, 2004, at approximately 10:30 a.m., a Southern Union construction employee discovered the mercury spill at the Tidewater facility. Shortly thereafter, Southern Union arranged for an environmental services company to remove the mercury spilled on the Tidewater facility grounds.

27. At no time after the mercury spill was discovered did Southern Union notify or attempt to notify the Pawtucket Fire Department or the Rhode Island State Fire Marshall about the mercury spill at the Tidewater facility.

COUNT ONE

(Hazardous Waste Storage Without a Permit—Liquid Mercury)

28. The Grand Jury realleges Paragraphs 1 through 27 as though fully set forth herein.

29. From on or about September 19, 2002 until on or about October 19, 2004, within the District of Rhode Island,

Southern Union Company

defendant herein, did knowingly store, and cause to be stored, hazardous wastes, namely, waste liquid

mercury, on the premises of 91 Tidewater Street, Pawtucket, Rhode Island, without a permit issued pursuant to RCRA.

All in violation of 42 U.S.C. §6928(d)(2)(A) and 18 U.S.C. §2.

COUNT TWO

(FAILURE TO PROVIDE EMERGENCY NOTICE OF RELEASE OF A HAZARDOUS SUBSTANCE)

30. The Grand Jury realleges Paragraphs 1 through 27 as though fully set forth herein.

The Emergency Planning and Community Right to Know Act (EPCRA)

31. The Emergency Planning and Community Right-to-Know Act ("EPCRA"), 42 U.S.C. §11001 *et seq.*, was enacted by Congress as the national legislation on community safety, designed to assist local and state authorities in protecting the public and the environment from hazardous chemicals. Among other things, EPCRA requires companies to keep inventories of hazardous and toxic chemicals, to plan for emergencies involving such hazardous substances, and to publicize information and provide notice regarding the uses and releases of such hazardous substances.

32. EPCRA also requires owners and operators of facilities that use, produce and store hazardous chemicals to immediately notify the emergency coordinator for the local emergency planning committee and the State emergency planning commission of releases of hazardous substances.

33. The local emergency planning committee for Pawtucket, Rhode Island was the Pawtucket Fire Department. The State emergency planning commis-

sion for Rhode Island is the Rhode Island State Fire Marshall.

34. EPCRA requires immediate emergency notification for releases of mercury in amounts equal to or greater than the reportable quantity established pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9603(b). The reportable quantity for mercury is one pound. 40 C.F.R. § 302.4. One pound of mercury is approximately two tablespoons.

35. From on or about October 19, 2004 up to and including October 20, 2004, in the District of Rhode Island and elsewhere,

Southern Union Company,

defendant herein, being owners and operators of a facility, namely, the Tidewater facility, at which a hazardous chemical was produced, used and stored, and from which a hazardous substance, namely, toxic mercury, had been released in a quantity greater than that determined pursuant to 42 U.S.C. §9602, namely, one pound or more, willfully and knowingly failed to immediately make the notification required by 42 U.S.C. §11004, to the community emergency coordinator for the local emergency planning committee, namely the Pawtucket Fire Department, or any of its respective designees, and to the State emergency planning commission, namely the Rhode Island State Fire Marshall, or any of its respective designees.

All in violation of 42 U.S.C. §11045(b)(4) and 18 U.S.C. §2.

COUNT THREE

(Hazardous Waste Storage Without a Permit—Mercury Regulators)

36. The Grand Jury realleges Paragraphs 1 through 27 as though fully set forth herein.

37. From on or about March 25, 2003 until on or about October 19, 2004, within the District of Rhode Island,

- Southern Union Company,

defendant herein, did knowingly store, and cause to be stored, hazardous wastes, namely, mercury-containing gas regulators, on the premises of 91 Tidewater Street, Pawtucket, Rhode Island, without a permit issued pursuant to RCRA.

All in violation of 42 U.S.C. §6928(d)(2)(A) and 18 U.S.C. §2.

A TRUE BILL:

REDACTED
Grand Jury Foreperson
DATED: October 16, 2007

ROBERT CLARK CORRENTE
UNITED STATES ATTORNEY

STEPHEN G. DAMBRUCH
STEPHEN G. DAMBRUCH
Assistant U.S. Attorney
Criminal Chief

TERRENCE P. DONNELLY
TERRENCE P. DONNELLY
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DIANNE G. CHABOT

DIANNE G. CHABOT
Special Assistant U.S. Attorney
U.S. Environmental Protection Agency

KEVIN M. CASSIDY

KEVIN M. CASSIDY
Trial Attorney, Environmental Crimes Section
U.S. Department of Justice

CR 07 134

PER 18 U.S.C. 3170

DEFENDANT INFORMATION RELATIVE TO A CRIMINAL ACTION - IN U.S. DISTRICT COURT

BY: ☐ INFORMATION ☒ INDICTMENT ☐ COMPLAINT

CASE NO. _____

Matter Sealed: ☐ Juvenile ☐ Other than Juvenile

☐ Pre-Indictment Plea ☐ Superseding ☐ Defendant Added
☐ Indictment ☐ Charges/Counts Added
☐ Information

USA vs.

Defendant: SOUTHERN UNION COMPANY

Address: **REDACTED**

Name of District Court, and/or Judge/Magistrate Location (City)

UNITED STATES DISTRICT COURT DISTRICT OF: RHODE ISLAND (Divisional Office)

Name and Office of Person Furnishing Information on THIS FORM: ROBERT CLARK CORRENTE ☐ U.S. Atty ☐ Other U.S. Agency
Phone No. _____

Name of Asst. U.S. Attorney (If assigned): TERRENCE P. DONNELLY

☐ Interpreter Required Dialect: _____

Birth Date _____ ☐ Male ☐ Female ☐ Alien (If applicable)

Social Security Number _____

PROCEEDING

Name of Complainant Agency, or Person (& Title, if any)
Environmental Protection Agency

☐ person is awaiting trial in another Federal or State Court (give name of court)

☐ this person/proceeding transferred from another district per (circle one) FRCrP 20, 21 or 40. Show District

☐ this is a reprosecution of charges previously dismissed which were dismissed on motion of: ☐ U.S. Atty ☐ Defense

SHOW DOCKET NO.

☐ this prosecution relates to a pending case involving this same defendant. (Notice of Related Case must still be filed with the Clerk.)

☐ prior proceedings or appearance(s) before U.S. Magistrate Judge regarding this defendant were recorded under

MAG. JUDGE CASE NO.

Place of offense: _____ County

DEFENDANT

Issue: ☐ Warrant ☑ Summons

Location Status:

Arrest Date _____ or Date Transferred to Federal Custody _____

☐ Currently in Federal Custody
☐ Currently in State Custody
☐ Writ Required
☐ Currently on bond
☐ Fugitive

Defense Counsel (If any): _____

☐ FPD ☐ CJA ☐ RET'D
☐ Appointed on Target Letter

☐ This report amends AO 257 previously submitted

OFFENSE CHARGED - U.S.C. CITATION - STATUTORY MAXIMUM PENALTIES - ADDITIONAL INFORMATION OR COMMENTS

Total # of Counts 3

Set	Title & Section/Offense Level (Petty = 1 / Misdemeanor = 3 / Felony = 4)	Description of Offense Charged	Felony/Misd.
	SEE ATTACHED		☐ Felony ☐ Misdemeanor
			☐ Felony ☐ Misdemeanor
	POSSIBLE RELATED CASE: CA06-45T		☐ Felony ☐ Misdemeanor
			☐ Felony ☐ Misdemeanor
			☐ Felony ☐ Misdemeanor

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OFFENSE CHARGED

Counts 1 & 3 — 42 USC § 6928(d)(2)(A) — Storing A Hazardous Waste Without A Permit

Penalties:

Fine of $50,000 per day of violation and 5 Years Probation

Count 2 — 42 USC §11045(b)(4) — Failing to Notify Emergency Response Official of a Release of Hazardous Materials

Penalties:
Fine of $500,000 and 5 Years Probation

Trial Time: 10 Days

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Filed 10/27/08]

CRIMINAL ACTION 07-134S

USA

vs.

SOUTHERN UNION COMPANY

OCTOBER 2, 2008
VOLUME 8
PROVIDENCE, RI

HEARD BEFORE THE HONORABLE
WILLIAM E. SMITH DISTRICT JUDGE
(JURY TRIAL)

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* * *

[110] DAVID DUGAN, first having been duly sworn, testified as follows:

THE CLERK: Please state your name and spell your last name for the record.

THE WITNESS: It's David James Dugan, D-U-G-A-N.

THE COURT: Good afternoon, Mr. Dugan.

[111] You may inquire, Mr. Donnelly.

MR. DONNELLY: Thank you, your Honor.

DIRECT EXAMINATION BY MR. DONNELLY

Q. Good afternoon, Mr. Dugan. Mr. Dugan, who do you work for, sir?

A. I work for the United States Environmental Protection Agency.

Q. In what capacity?

A. My title is Regional Technical Coordinator.

Q. What's a regional technical coordinator, Mr. Dugan?

A. I support criminal investigations, collecting environmental evidence.

* * *

[114] Q. Do you recognize what's depicted in this picture, Mr. Dugan?

A. Yes, sir.

Q. What is it?

A. Those are the two drums that we observed at around eight, 8:30.

Q. A.m.?

A. Yes, sir. 8:30 in the morning at the Clean Harbors environmental facility.

Q. Were they taped together like that with the yellow caution tape?

A. Yes, sir. And both drums were sealed. They had custody seals on them.

Q. When you say, "They had custody seals on them," what do you mean?

A. There were custody seals affixed to the top of drum. For anyone to remove the top of the drum, they [115] would break the seal.

Q. Were those seals broken when you looked at them?

A. No, sir.

Q. What did you do first upon observing what you see here in Government's 327?

A. We removed the top of the black drum, the 55-gallon steel drum, and observed the contents within.

Q. And what was in there?

A. There was a five-gallon pail inside. There was absorbant material, which appeared to be vermiculite; and the five gallon pail was sitting on top of this absorbant material inside the 55-gallon drum. That's the only thing that was inside.

MR. DONNELLY: All right. Can we bring up Government's Exhibit 330 for identification, please.

Q. Do you recognize that white pail?

A. Yes, sir.

Q. What is it?

A. That's the five-gallon white pail that was inside the black 55-gallon drum.

Q. As regards the previous picture of the two drums and this picture, who is taking these picture? [sic]

A. Mr. Granz.

Q. Is that your partner or associate with the EPA?

A. Part of sampling team, yes, sir.

[116] Q. Was this picture taken before you opened the white pail?

A. I believe it was.

MR. DONNELLY: Move 330 full, please.

MR. FETTERMAN: No objection, your Honor.

THE COURT: 330 will be full. You may publish it to the jury.

(Government Exhibit 330 admitted full.)

Q. Mr. Dugan, there appears to be some writing on top of the pail.

MR. DONNELLY: And I don't know, Mr. Foster, if we can zoom in on that.

Q. Do you recognize that writing?

A. No, sir.

Q. Okay. Did you open the five-gallon pail?

A. Yes, we did.

Q. And showing you Government's 331 for identification, do you recognize that?

A. Yes, sir.

Q. What is it?

A. There are two one liter glass jars or quarts, and then there was a pint-size jar as well inside the five-gallon pail with absorbent material underneath.

MR. DONNELLY: Would move 331 full, please.

MR. FETTERMAN: No objection, your Honor.

[117] THE COURT: 331 will be full. You may publish it.

(Government Exhibit 331 admitted full.)

Q. Now, when you—after this picture was taken, you opened the white five-gallon drum, what did you do next, Mr. Dugan?

A. Well, the first thing that I recall doing was labeling each one of the jars.

Q. Why did you do that?

A. They were unlabeled. There was no identification whatsoever on any of these glass jars.

Q. And how did you label them?

A. We observed—we pulled out each of the containers, observed what was inside. One of the liter glass jars, the larger jar here, and observed that one of them had anywhere between 200 to 250 milliliters or about a fifth or a quarter full of what appeared to be elemental mercury.

Q. When you say you labeled the jars, how did you label them?

A. I'm sorry. A, B, and C.

Q. How did you do that?

A. With a lab marker. Permanent marker. We labeled the top of the lids.

Q. And which of them, A, B or C, had the I think you [118] said quarter full of the quart jar of liquid mercury?

A. That was designated A.

Q. What did you observe about the contents of jars B and C?

A. I recollect that there was maybe a teaspoon, possibly a tablespoon in the other two jars, but it had a lot of soil and debris.

Q. A tablespoon of what, sir?

A. Elemental mercury.

Q. And so did you take any samples from Jar B or Jar C?

A. No, sir.

Q. Did you take a sample or two from Jar A?

A. We did.

Q. How did you do that?

A. I used a COLIWASA.

Q. COLIWASA. How do you spell that?

A. It is capitals, C-O-L-I-W-A-S-A.

Q. And you'll forgive me if I don't ask you what all stands for?

A. That is an acronym. It's—

Q. That's okay. I wasn't asking you. I was just—

A. Oh, okay.

Q. What is a COLIWASA? Describe what it is for the jury.

[119] A. It's a glass tube that is approximately three, three-and-a-half feet long. It's primarily used to sample drums, 55-gallon drums where you have this larger diameter tube. I want to say it's either an inch, inch-and-a-quarter in diameter, and it's tapered at the bottom. You have an inner tube that runs right

down the inside and the inside tube has a ground stopper.

So when done—the right technique for using this COLIWASA, what you do is you raise the inner tube about two inches off the bottom, the tapered bottom, and you lower it slowly through a column of liquid. The intent is to get a full cross-section of the liquid that's in a drum. Okay? It's a full profile.

And to best describe that is if you took this five-gallon pail, and you put one gallon of water in the bottom, and you added, let's say, three gallons of oil. Everyone knows oil floats on water. If I were to just dip a sampling jar into the oil, that's all I would get is oil. Using a COLIWASA, I would get the three gallons of oil, plus the one gallon of water inside my COLIWASA so I'm getting the full profile.

Q. You're get [sic] a cross-section?

A. I got a cross-section.

Q. And you used that in Jar A that had the liquid [120] mercury?

A. That is correct.

MR. DONNELLY: Could we bring up Government's Exhibit 332, please.

Q. Do you recognize this picture, Mr. Dugan?

A. Yes, sir. That is Jar Number A.

MR. DONNELLY: Would move this full, please.

MR. FETTERMAN: No objection, your Honor.

THE COURT: Was that no objection?

MR. FETTERMAN: No objection.

THE COURT: All right. 332 will be full. You may publish it to the jury.

(Government Exhibit 332 admitted full.)

Q. And Mr. Dugan, you testified that this bottle, I think, was a fifth to a quarter full?

A. Yes, sir.

Q. So are we looking here at the mercury that was in it?

A. Yes, sir.

Q. Now, how many samples did you take from Jar A?

A. We collected one sample, and then we went in with a COLIWASA and grabbed another sample and filled—and put it into another jar. That is considered a duplicate. And we take duplicates for quality control, that purpose.

* * *

[124] Q. Now let me ask you about the blue barrel. What was in there when you opened it up, sir?

A. The blue poly drum, which is about 30 gallons. The black one was a standard 55-gallon. The blue drum, we opened that up, and we noticed that there were five [125] mercury regulators, sealed regulators inside, each individually wrapped in plastic. And they were stored inside the blue 30-gallon drum.

Q. And after making this observation, did you empty the contents of the blue barrel, or what did you do?

A. I believe we reached in and pulled one of the regulators out. I believe that was identified as A08227. And it looked like it may have been painted on, that identifier number, on that particular MSR.

Q. How many regulators were in the barrel totally?

A. There were five in total.

Q. Did they all have numbers of some kind on them?

A. All but one.

Q. One had no identification on it?

A. That is correct.

Q. Did you put these identifying numbers on?

A. No, sir.

Q. And when you say they were wrapped in plastic, what kind of plastic are we talking about?

A. Plastic sheeting. They weren't bags. It looked like plastic sheeting that were cut to size and they were just wrapped around the MSRs.

Q. What observations did you make about this regulator, sir?

A. Well, the first observation was when we unwrapped [126] the plastic from the MSR, we observed a small pool of mercury in the plastic.

Q. What did you do with that mercury that was in the plastic?

A. We poured that into a four-ounce glass jar.

Q. A third sample?

A. That is correct. Station Number 3.

MR. DONNELLY: Is this still up for the jury, Government's Exhibit 322? Thank you.

Q. So Station Number 3, you poured that mercury into a jar. And did you give it a label, sir?

A. Yes, sir.

Q. Did it include this unique identifier 05889?

A. It did.

Q. How did you get it from the plastic into the sample jar?

A. Carefully. We pretty much just bent the plastic to where we could literally pour the mercury right into a four-ounce wide-mouth jar.

MR. DONNELLY: Could we bring up Government's Exhibit 337 for identification, please.

Q. Do you recognize this photograph, Mr. Dugan?

A. Yes, sir.

Q. What is it?

A. That is the regulator that we pulled out. As I [127] said, it was painted A0 8227. And on top of the regulator is the four-ounce glass jar that we poured the mercury into that was off the plastic sheeting.

MR. DONNELLY: Would move 337 full, please.

MR. FETTERMAN: No objection, your Honor.

THE COURT: 337 will be full.

(Government Exhibit 337 admitted full.)

Q. So when you were talking about the markings, you were referring to these here?

A. Yes, sir.

Q. Now, what did you do with this regulator after getting the mercury that was resting inside the plastic?

A. We had a screwdriver and removed three screws off the cover plate of this regulator, and we observed the inside of it. And we observed there was also mercury inside.

Q. What did you do with that mercury, if anything?

A. We carefully poured that into another four-ounce glass jar.

Q. Was that your fourth sample?

A. That was our fourth sample.

MR. DONNELLY: Mr. Foster, could we have 322 one more time, please.

Q. And did you note the—is this the unique [128] identifier for the fourth sample, 05890?

A. That's correct.

Q. Now, you did not take samples from the other regulators?

A. No, sir. I believe we examined two or three other ones.

* * *

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

CRIMINAL ACTION 07-134S

USA

vs.

SOUTHERN UNION COMPANY

OCTOBER 3, 2008
VOLUME 9

PROVIDENCE, RI

HEARD BEFORE THE HONORABLE
WILLIAM E. SMITH DISTRICT JUDGE
(JURY TRIAL)

* * *

[56] JOHN FOWLER, first having been duly sworn, testified as follows:

THE CLERK: Please state your name and spell your last name for the record.

THE WITNESS: John W. Fowler, F-O-W-L-E-R.

MR. CASSIDY: May I inquire, your Honor?

[57] THE COURT: Yes, you may.

DIRECT EXAMINATION BY MR. CASSIDY

Q. Good morning, Mr. Fowler.
A. Good morning.
Q. What is your current job, sir?

A. I'm a chemist with the National Enforcement Investigation Center, which is part of the U.S. Environmental Protection Agency.

Q. As a chemist for NEIC, we can call it that for short, what do you do currently with NEIC?

A. I'm currently in the field branch. I go out, collect samples, do testing in the field, that sort of thing.

* * *

[76] Q. Now, I want to direct your attention back to—toward the end of 2004. At some point, did you get involved in a case involving mercury samples from a mercury release in Pawtucket, Rhode Island?

A. Yes, I did.

* * *

[82] Q. Okay. Now, did you do an initial—how many different types of tests did you perform on the material that you received?

A. I did two types of testing on these samples.

Q. Okay. What were those two tests?

A. The primary reason we were asked to analyze these samples were to determine if they would exhibit the hazardous waste characteristic of toxicity. They were believed to be mercury. And mercury is one of the metals that is covered under what's called the RCRA regulations, Resource Conservation Recovery Act. Materials that failed this extraction procedures test exhibits the hazardous waste characteristic.

The second purpose of my analysis was just to demonstrate that it was mercury, not just something that happened to look like mercury.

Q. Let's take the second test first. First of all, when you—can describe to the jury how you went and

took the samples out of where you had them stored and brought them to your lab, how you prepared the samples for testing.

A. To determine if the material was indeed mercury, I [83] took the samples and took a very small amount of it, digested it, which means just bring it into a solution with nitric acid. Mercury, you would expect it to dissolve in nitric acid, then I brought it up to a certain volume. Then this liquid I could analyze on our instruments in the laboratory and calculate roughly the percent mercury in the material we started with.

Q. And had you seen mercury before?

A. Yes, I have.

Q. And did you observe the material before you did any preparation?

A. It certainly looked like mercury to me.

Q. So in your experience, you would—

A. I would have bet almost anything that it was mercury, but I just wanted to cover every base.

Q. Understood. What did the mercury look like physically? What was its physical appearance?

A. Mercury is a liquid. Silvery, pure new mercury you get would be like a very clean looking, no blemishes, nothing floating on the outside of it, no discoloration.

Q. What did this mercury look like?

A. It looked like it had been handled or used—

MR. PETROS: Objection.

THE COURT: Just a second. There's an [84] objection. What's the objection?

MR. PETROS: There were four samples, as I understand it, this witness viewed.

THE COURT: I'll sustain the objection. You can be a little more precise with your question.

MR. CASSIDY: Yes, your Honor.

Q. Did you observe all four samples?

A. Yes. I did a physical description of all four samples, and it looked like mercury already had been handled. There was grittiness on the surface, a little discoloration. It wasn't bright and shiny like a mirror.

Q. And the test you did you described to determine if it was mercury, what was the result of that test?

A. It was primarily mercury greater than 95 percent purity. That is the limit of the test, the instrumentation limitations how accurate I could say it was, how pure it was.

Q. So you determined it was mercury?

A. It was mercury.

Q. And did you make that determination for all four samples?

A. Yes. I tested all four of the samples, and they were all greater than 95 percent mercury.

* * *

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

CRIMINAL ACTION 07-134S

USA

vs.

SOUTHERN UNION COMPANY

OCTOBER 14, 2008
VOLUME 13

PROVIDENCE, RI

HEARD BEFORE THE HONORABLE
WILLIAM E. SMITH DISTRICT JUDGE

(OBJECTIONS TO JURY CHARGE, CLOSING ARGUMENTS AND JURY CHARGE)

* * *

[138] THE COURT: All right, ladies and gentlemen. Well, we're almost at the end. And before I begin my formal instructions to you, I want to—I just want to say this has been a hard-fought case and a [139] well-advocated case by all counsel. They've done a very good job.

And it's an important case, as counsel has told you. And your job is, as it is with every jury, is very, very important.

So what I am going to do now is instruct you on the law that is applicable to this case. And as I told you

at the beginning of the trial, you must accept this law whether you agree with it or not and you must apply the law that I give you to the facts of this case as you find those facts to be.

Now, in applying the law that I'm about to explain to you in these instructions, you must consider my instructions as a whole. You should not choose one part of the instructions and disregard another, and you must accept and apply the law as I give it to you in its entirety. And also, you must accept and apply the rules of law that I give you whether you agree with them or not.

It would be a violation of the oath that you took as jurors to base a decision in this case on any version of the law other than that contained in my instructions, just as it would be a violation of your oath as jurors to return a decision based on anything other than the evidence that has been presented in this

* * *

[146] the Defendant, you will return a verdict of guilty on that charge. If, on the other hand, you think there is a reasonable doubt whether the Defendant is guilty of a particular offense, you must give the Defendant the benefit of the doubt and find that Defendant not guilty of that offense.

Now, you will have with you in the jury room the Indictment in this case to help you remember the precise nature of the charges against the Defendant.

I remind you once again that an Indictment is nothing more than an accusation. It is not evidence of guilt, nor of any of the facts alleged. It may not even be the basis of an inference of guilt.

All that it does is to bring this matter before you for determination. Beyond that, it has no significance whatsoever. It merely sets forth the elements of the offense or offenses which the Government must prove beyond a reasonable doubt.

The Defendant, Southern Union, is not on trial for any act or conduct that is not specifically alleged in the Indictment.

Now, the Indictment contains three counts directed at the Defendant. Count I charges that on or about September 19, 2002, to October 19, 2004, Defendant knowingly stored hazardous waste, liquid [147] mercury, without a permit at the Tidewater facility in Pawtucket, Rhode Island, under the Resource Conservation and Recovery Act or RCRA.

Count II charges that on October 19, 2004, up to and including October 20, 2004, the Defendant knowingly and willfully failed to immediately provide notice to the state Emergency Planning Commission and to the local emergency planning committee of a release of mercury from the Tidewater facility under the Emergency Planning and Community Right-to-Know Act or EPCRA.

Count III charges that from on or about March 25, 2003, until on or about October 19, 2004, Defendant knowingly stored hazardous waste, mercury-containing gas regulators, without a permit at the Tidewater facility under RCRA.

Now, a separate offense is charged against Southern Union in each of the three counts that you will consider. You are to consider and to decide each count separately and on its own merits.

The fact that you may find the Defendant guilty or not guilty as to one of the offenses charged should not control or have any bearing whatsoever on your finding as to any other offense charged in the Indictment.

Additionally, I am instructing you that this is [148] not a case about negligent security. The level of security and the conditions at Tidewater are not elements of any of the charges against Southern Union.

Later in these instructions I will instruct you as to the purposes for which you may consider the level of security and the conditions at Tidewater.

The term "person," as that term is used in all of the counts in the Indictment, is defined to include corporations as well as individuals.

Now, you will note that the Indictment charges that some of the offenses were committed on or about a particular date. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in this case establishes beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

Now, I am going to give you an overview first of Counts I and III. Those are the counts that charge the violation of RCRA. And then I'm going to do Count II, the EPCRA count, after that.

First with respect to the overview, Counts I and III of the Indictment in this case charge the Defendant, Southern Union Company, with storage of hazardous waste without a hazardous waste permit in violation of the resource recovery and conservation or [149] conservation and recovery act or RCRA.

I will give you specific instructions on each count in a moment; but generally RCRA is a Federal law that regulates the transportation, treatment, storage and disposal of hazardous waste.

Under its provisions, anyone who stores hazardous waste in Rhode Island may be required to have a permit issued by the State of Rhode Island. The State of Rhode Island is authorized by the United States Environmental Protection Agency to issue hazardous waste permits.

Hazardous waste permits specify the requirements for the safe transportation, treatment, storage and disposal of hazardous waste at permitted facilities.

Now, Count I of the Indictment, as I've just said, charges that from on or about September 19, 2002, until on or about October 19, 2004, on the premises of 91 Tidewater Street, Pawtucket, Rhode Island, Southern Union knowingly stored and caused to be stored a hazardous waste, namely waste liquid mercury, without a permit in violation of 42 United States Code, section 6928(d)(2)(A).

That section of the United States Code provides in part that any person who knowingly treats, stores or disposes of any hazardous waste without a permit shall [150] be guilty of an offense against the United States.

For you to find the Defendant guilty of Count I, you must be convinced that the Government has proven each of the following things beyond a reasonable doubt as to the Defendant, Southern Union.

First, that the Defendant, Southern Union, knowingly stored a waste material identified in the Indictment as liquid mercury;

Second, that the waste material stored was listed or identified as a hazardous waste by the United States Environmental Protection Agency pursuant to RCRA;

Third, that the Defendant, Southern Union, was required to have a hazardous waste storage permit and that it had not obtained a permit from the State of Rhode Island authorizing storage at the Tidewater location;

Fourth, that the Defendant, Southern Union, knew that the waste material was waste and that the waste had the substantial potential to be harmful to others or to the environment.

Now I'm going to give you some specific instructions as to some of the terms that I just used with respect to Count I.

The Government must prove that the Defendant, [151] Southern Union, acted knowingly. An act is done knowingly if the Defendant is aware of the act and does not act through ignorance, mistake or accident.

The Government is not required to prove that the Defendant knew that its acts or omissions were unlawful.

The Government is not required to prove that the Defendant knew that the material it stored was identified as a hazardous waste pursuant to RCRA or that it knew that it needed a permit to store such waste.

The Government also does not need to prove that the Defendant knew it was violating RCRA. However, what the Government must prove is that the Defendant knew it was storing material, knew that the

material was waste and knew that the material had the substantial potential to be harmful to others and the environment.

You may consider evidence of the Defendant's words, acts or omissions along with all other evidence in deciding whether the Defendant acted knowingly.

Determining whether the Defendant acted knowingly requires you to evaluate the Defendant's state of mind. Ordinarily there is no way that a Defendant's state of mind can be proven directly [152] because no one can read another person's mind and tell what that person is thinking.

But a Defendant's state of mind can be proved indirectly from the surrounding circumstances. This includes things like what the Defendant said, what the Defendant did, how the Defendant acted and any other facts or circumstances in evidence that show what was in the Defendant's mind.

You may also consider the natural and probable results of any acts that the Defendant knowingly did or did not do and whether it is reasonable to conclude that the Defendant intended those results.

So if the Defendant's actions or inaction convinces you that the Defendant knew that it was storing hazardous waste, the Government has met its burden on this element.

However, if you find that the Defendant intended that the liquid mercury was stored for eventually—for eventual recycling, then the Defendant did not knowingly store a waste.

In that case, the Government has not met its burden on this element, and you must find Southern

Union not guilty of Count I. All of this, of course, is for you to decide.

Now, in considering whether the Government has [153] proven the element of knowledge, you may consider the collective knowledge of Southern Union as a corporation.

This means that you can consider the knowledge of its officers, employees, directors and agents. Southern Union's knowledge can be the knowledge of one of its agents or employees or the sum of knowledge—the sum of the knowledge of some or all of its employees operating within the scope of their employment.

For example, if Southern Union employee A knows one thing and B knows something else and C knows a third thing, then you may conclude that Southern Union knows them all.

It is irrelevant whether information obtained by one employee was or was not acquired by another employee at Southern Union because the corporation is considered to have the collective knowledge of all of these employees.

Likewise, it is irrelevant whether employees administering one component of an operation or a job or a location or department at Southern Union knew of the specific activities of employees administering a different aspect of the same thing. All of that collective knowledge is imputed to the corporation, [154] Southern Union.

Now, the term "stores" under the statute means the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of hazardous waste.

Now, the Government is required to prove that the material in this case was a hazardous waste. However, before you may conclude that the liquid mercury in this case was a hazardous waste, the Government must first prove that the liquid mercury was a solid waste. So the first issue for you to decide is whether the liquid mercury was a solid waste.

A solid waste is defined as garbage, refuse or any other discarded material, including solid, liquid or semi-solid material, resulting from industrial or commercial operations.

A material is considered discarded if it is, one, abandoned or, two, if it is a spent material that is reclaimed or accumulated, stored or treated before reclamation.

A material is abandoned if it is disposed of or accumulated, stored or treated but not recycled before or in lieu of being disposed of.

A spent material is any material that has been [155] used and as a result of contamination can no longer serve the purpose for which it was produced without processing.

A material is not considered discarded if it is a commercial chemical product that is, one, reclaimed or, two, accumulated, stored or treated before reclamation. I will instruct you as to the definition of commercial chemical product in a moment.

A material is reclaimed if it is processed to recover a usable product or if it is regenerated. You may consider all of the evidence in this case to determine the Defendant's actual intent concerning whether a material was intended for discard as a waste, in other words, was abandoned, or whether Southern Union's

material was intended for use as a commercial chemical product, in other words, intended for recycling.

Commercial chemical products are chemicals manufactured or formulated for commercial or manufacturing use. Commercial chemical products are pure or technical grades of a chemical that is produced or marketed, including all formulations in which the chemical is the sole active ingredient.

Commercial chemical products that are unused are not necessarily solid waste. A commercial chemical [156] product becomes a solid waste only if and when it is discarded or intended to be discarded. The meaning of the term "discarded" here is as I have instructed previously.

As I've explained, materials are waste if they are discarded by being abandoned or if they are spent material, even if intended for eventual recycling.

A material is not waste if it is a commercial chemical product that is intended for recycling. Therefore, I need to give you some information about the meaning of recycling.

A material is recycled if it is used, reused or reclaimed. Commercial chemical products that are used at one time but remain a commercial chemical product after use can be—and can be directly used or reused are not considered to be discarded and, therefore, are not solid waste.

These materials retain their status as product. This is true even if the material or item the commercial chemical product is derived from is a solid waste. For example, commercial-grade lead is a commercial

chemical product even if it is derived from a used battery that is a solid waste.

In addition, commercial chemical products are not considered to be discarded and are, therefore, not [157] solid waste when they are recycled by being reclaimed. The act of reclamation involves materials that are processed to recover a usable product or that are regenerated. An example of reclamation is the recovery of mercury from a thermometer.

Also, a commercial chemical product that is speculatively accumulated prior to being recycled by being reclaimed or reused is not a discarded material and is not a solid waste.

There is no law or regulation that limits the length of time one may store or accumulate a commercial chemical product prior to recycling it provided that the intent is to recycle the material.

The RCRA regulations do not regulate the conditions of storage for a commercial chemical product. Conversely, a company may not avoid its obligation to obtain a hazardous waste permit by claiming that it expects or intends to eventually recycle without a legitimate expectation of doing so.

You may consider the length of time and the conditions in determining what the Defendant's intent was regarding the liquid mercury. Thus, an entity that intends to have its commercial chemical product reclaimed or reused at some point in the future is not managing a solid waste unless and until the point in [158] time when it makes a decision to discard the material rather than to recycle the material.

In this case, it is your job to determine whether Southern Union intended to have the liquid mercury

reclaimed or reused at some point in time or whether at some point in time the liquid mercury was discarded by being abandoned.

If you find that the liquid mercury stored at Tidewater was an unused commercial chemical product or that it was a used commercial chemical product that Southern Union intended to recycle, then you must find Southern Union not guilty of Count I.

Conversely, if you find that the liquid mercury was discarded by Southern Union by being abandoned, then the fact that the mercury may be of commercial grade is of no avail to Southern Union on Count I because it is determined to be waste.

Now I'm going to move to the second element of Count I. If you determine that the liquid mercury was a solid waste, the next question you'll have to decide is whether it was hazardous.

A solid waste may be found to be a hazardous waste if it is listed as such in the EPA regulations or exhibits one or morph [sic] several possible hazardous characteristics, including the characteristic of [159] toxicity as defined in the following instruction I'll give you in a moment.

However, a commercial chemical product as defined in these instructions that is recycled or intended for recycling is not a hazardous waste.

I'm now going to talk to you about the characteristics of hazardous waste. As I just described to you, the term "hazardous waste" can mean a solid waste that exhibits one of several possible hazardous characteristics, including the characteristic of toxicity.

Having instructed you with respect to the definition of solid waste, I'm now going to instruct you on

the specific characteristics that solid waste must have for it to be a hazardous waste.

The Government is required to prove beyond a reasonable doubt that Southern Union stored hazardous waste as defined under RCRA at Tidewater.

The term "hazardous waste" as used in the statute means a solid waste that has been identified or listed as hazardous by the EPA and the State of Rhode Island.

A solid waste is a hazardous waste if it is either a characteristic hazardous waste or a listed hazardous waste under EPA and Rhode Island regulations.

[160] Characteristic hazardous wastes are wastes that are hazardous because they exhibit one or morph [sic] the hazardous characteristics identified in the regulations, such as toxicity.

A solid waste is a hazardous waste exhibiting the characteristic of toxicity if a liquid extract using a test method set forth in the regulations called the toxicity characteristic leaching procedure or TCLP contains mercury at a concentration equal to or in excess of 0.2 milligrams per liter.

The TCLP test is one way the Government may show that mercury described in the Indictment exhibited the characteristic of toxicity, rendering it a hazardous waste under RCRA.

You may consider all of the evidence in this case in determining whether the liquid mercury and the mercury-containing regulators, which I'll get to in a moment, were toxic or otherwise characteristic hazardous waste.

Also, some materials are specifically named or listed as hazardous wastes in the EPA and state

regulations. Mercury is a listed hazardous waste when it is described—I'm sorry, when it is discarded or intended to be discarded. I instructed you on the meaning of "discarded" a few moments ago when I gave [161] you the definition of solid waste.

Now I'm going to move on to the third element of Count I, and that is the permit requirement. The third element requires the Government to prove beyond a reasonable doubt that the liquid mercury was a hazardous waste stored without a storage permit authorized under RCRA, that the law required a permit and that the Defendant did not have the required permit.

As I mentioned earlier, the term "stores" means the containment of hazardous waste either on a temporary basis or for a period of years in such a manner as not to constitute disposal of hazardous waste.

The Government has charged the Defendant with storage of hazardous waste, not disposal. The Government need not show that the Defendant, Southern Union, knew that the law required a permit.

And now the fourth element and final element of Count I, substantial potential for harm. The fourth element of Count I requires the Government to prove beyond a reasonable doubt that the Defendant, Southern Union, knew the liquid mercury was hazardous and had a substantial potential to be harmful to others or the environment.

[162] The Government is not required to prove that Southern Union knew that the material would be classified as hazardous waste if tested or that it was specifically listed or was a hazardous waste in the regulations.

So that concludes my instructions on the elements of Count I. We're now going to move to Count III, the mercury-containing gas regulators.

So Count III of the Indictment charges from on or about March 25, 2002, until on or about October 19, 2004, on the premises of 91 Tidewater Street, Pawtucket, Rhode Island, Southern Union knowingly stored or caused to be stored a hazardous waste, namely mercury-containing regulators, without a permit in violation of Title 42 United States Code, section 6928(d)(2)(A).

Now, the basic elements of Count III are as I instructed you with respect to Count I, the other RCRA count, and I'm not going to repeat everything again, all right, but that is that the Government must prove four elements beyond a reasonable doubt.

First, that the Defendant, Southern Union, knowingly stored a solid waste alleged in the Indictment in Count III to be mercury-containing gas regulators;

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Cr. No. 07-134S

UNITED STATES OF AMERICA

vs.

SOUTHERN UNION COMPANY

VERDICT FORM

1. As to Count 1 of the Indictment, on or about September 19, 2002 to October 19, 2004, knowingly storing a hazardous waste, liquid mercury, without a permit, we the jury find the Defendant, Southern Union Company

GUILTY	NOT GUILTY
✓	

2. As to Count 2 of the Indictment, on October 19, 2004 up to and including October 20, 2004, knowingly and willfully failing to immediately notify the state emergency planning commission and the local emergency planning committee of a release of a reportable quantity of liquid mercury, we the jury find the Defendant, Southern Union Company

GUILTY	NOT GUILTY
	✓

3. As to Count 3 of the Indictment, on or about March 25, 2003 to October 19, 2004, knowingly storing a hazardous waste, mercury containing

gas regulators, without a permit, we the jury find the Defendant, Southern Union Company

GUILTY	NOT GUILTY
_____	✓

10/15/08

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Cr. No. 07-134 S

UNITED STATES OF AMERICA,

v.

SOUTHERN UNION COMPANY

DECISION AND ORDER ON MOTION FOR JUDGMENT OF ACQUITTAL AND MOTION FOR NEW TRIAL

William E. Smith, United States District Judge.

* * *

IV. Motion for New Trial

In the alternative to its Motion for Judgment of Acquittal, the Defendant submits that a new trial is necessary because (1) it was deprived of a critical defense under the applicable regulations; (2) the evidence weighed heavily against the verdict on the issues of whether the liquid mercury was a waste and whether the company knowingly stored it; and (3) the Court improperly allowed evidence about the conditions at Tidewater and Southern Union's failure to contact police following the spill. Each of these arguments will be addressed in turn, though none warrants a new trial, or even extensive discussion.

A motion for a new trial is directed to the broad discretion of the trial judge, and appropriate only "if the interest of justice so requires." Fed. R. Crim. P. 33;

United States v. Indelicato, 611 F.2d 376, 387 (1st Cir. 1979).

* * *

Second, the Defendant attacks the weight of the evidence used to convict it of Count I (storing liquid mercury without a permit). Its argument for a new trial on this point has two themes: first, that the Government failed to prove that the liquid mercury the Defendant stored was a *waste*; and second, that the weight of the evidence does not support finding it *knowingly* stored a waste. "Where a new trial motion is based upon the weight of the evidence, the court may not order a new trial 'unless it is quite clear that the jury has reached a seriously erroneous result.'" *United States v. Ruiz*, 105 F.3d 1492, 1501 (1st Cir. 1997) (quoting *United States v. Rothrock*, 806 F.2d 318, 322 (1st Cir. 1986)). This is by no means a low hurdle, and Defendant comes nowhere near clearing it.

A key question at trial was whether the liquid mercury at Tidewater was a waste (so said the Government) or a "commercial chemical product" (so said the Defendant). At the heart of this dispute is what, if anything, the Defendant intended to do with the mercury (nothing said the Government; recycle it said the Defendant). The Defendant claims the jury could not have found the mercury was a waste because the evidence "clearly" showed it could be poured and was at least 99% pure mercury—a valuable commercial product. And, it argues, employee testimony, contemporaneous documents, and company actions all demonstrate an intent to recycle.

The evidence presented to the jury was such that reasonable minds could differ. As to whether the mercury was "pure," the Government showed

some degree of contamination and established that re-processing would have been necessary to make this mercury truly a pure commercial grade. The more important point is the Defendant's intent. Here, the jury sided with the Government as to what the evidence showed: that the company did not intend to recycle and stored mercury at Tidewater in lieu of disposal. The Court need not rehash the entire record, which is voluminous. Suffice it to say, there was more than ample evidence to support the jury's conclusion; for example, the storage and security conditions at Tidewater, employee testimony that items were stored at Tidewater "instead of throwing [them] away," *see* Trial Tr. Vol 1, p. 78 (Doc. 105), and numerous references in company documents to the mercury as "waste" and to Tidewater as a "disposal area."

The Defendant next argues that the record did not support a finding that it *knowingly* stored a waste. In essence, this is but a slightly different flavor of the weight of the evidence argument discussed above regarding the company's intent—that it "considered" the mercury a product (because it planned to recycle it) and thus could not have knowingly stored it as a waste. For the reasons already discussed, this argument is unpersuasive. All in all, what the mercury was and what the company intended to do with it were hot button issues at trial. Given the evidence presented on both sides of the issue, there was nothing clearly erroneous about the jury's decision. *See United States v. Wilkerson*, 251 F.3d 273, 278 (1st Cir. 2001) (court weighs and evaluates credibility of the evidence in determining whether a new trial is appropriate).

* * *

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Filed 10/13/09]

CRIMINAL ACTION 07-134S

USA

vs.

SOUTHERN UNION COMPANY

OCTOBER 2, 2009
PROVIDENCE, RI

HEARD BEFORE THE HONORABLE
WILLIAM E. SMITH DISTRICT JUDGE
(SENTENCING)

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* * *

[51] THE COURT: All right. Very good.

Now, does the Defendant corporate representative have anything to say prior to sentencing?

MR. TARANTINO: No, your Honor.

Your Honor, should we rise for this?

THE COURT: I'm sorry?

MR. TARANTINO: I'm sorry. I thought you were ready to sentence.

THE COURT: I am, but I have some comments, so you don't have to stand up. I want to go through some

of my analysis here to explain my decision with respect to sentencing.

I do think this is a complicated, difficult decision to determine the appropriate sentence. And I think the appropriate approach for a court to take in a [52] situation like this is to go back to the governing statutes and to work from the statutes to try to get to an appropriate sentence.

I have to begin, as I indicated in my dialogue with Mr. Tarantino, with the fact that the corporation, the Defendant, has been convicted of a serious crime and that question was decided by the jury. And so whatever differences one might have about the law that applies and the issues that are discussed in the two opinions that I've written in this matter, the jury has spoken and the Defendant stands convicted of a serious environmental crime.

The first statute that I look to in determining the appropriate sentence is the RCRA statute itself. What Congress provided for in that statute is a fine of up to $50,000 per day in 42 U.S.C. 6928(d). It strikes me that Congress, in leveling the potential fine of $50,000 a day, was attempting to speak to the seriousness of these kinds of crimes and the seriousness of the violation; and also, that tells me that the length of the violation has to be part of what is factored in. In this case, the length of the violation is 762 days, which yields a maximum fine, as we have discussed, of $38.1 million.

Now, the second statute that I believe I'm [53] required to look to is 28 U.S.C. 3572, which is the fine statute, and we've talked about some of these factors today in my questions to counsel.

There are eight factors to consider under 3572. And the first one is the income of the Defendant. And it is not just the—it is not phrased as the defendant's ability to pay, but it's rather the defendant's income, financial resources or any capacity. That's the first factor. And in this case, obviously, the Defendant corporation is a very wealthy, very successful company and that argues in favor of a more substantial financial penalty.

The second factor is the burden that the fine or the financial penalty would have upon the defendant and the ability of the defendant to, essentially, survive and the effect it might have on individuals who are dependent upon the defendant. I think there's very little danger in this case of any fine, even a fine to the maximum, that it would have a significant damaging effect in terms of the survival of either the Defendant or people who depend on the Defendant. So that, again, argues in favor of a substantial penalty.

The third factor is the pecuniary loss inflicted upon others as a result of the offense. Pecuniary loss of the victims here is hard to quantify because the [54] company did step forward and attempt to do everything that it could to alleviate losses suffered by the individuals who were affected by the spill in terms of providing housing, providing food; and the company has settled the civil case with the victims in a manner that must be satisfactory to the victims, otherwise, they wouldn't have settled.

So it seems to me that, in terms of pecuniary loss, this factor is relatively neutral. Having said that, I think the loss otherwise on the victims is substantial, and I think that comes into play under the next statute, the 3553 factors. But pecuniary loss, I think, is relatively neutral.

The fourth factor is restitution, and I don't see that to be a factor at all in this case. To the extent remediation can be looked at as restitution, the company has stepped forward and performed the remediation of the site to the tune of approximately $6 million. If anything, that factor weighs in the company's favor.

The fifth factor is, again, of no consequence here, and that is the need to deprive the Defendant of any illegally gotten gains as a result of the offense. I don't see that to be applicable at all.

Sixth, the cost to the Government of any form of [55] punishment in terms of the cost of incarceration or the cost of supervised release and probation. While there could be some costs to the Government here, I think they are, essentially, negligible and so don't require any factoring in.

The seventh factor is whether the Defendant can pass the punishment on to consumers. Now, that's an interesting factor to consider. And as Mr. Tarantino has said, he thinks a company would be prohibited from doing that but I intend to make it part of my order that the company not pass on the expense of the punishment in this case to its consumers. And that will be part of the order, and I assume that that can be enforced both by the usual regulatory bodies but also by the Government as part of ensuring the compliance with the order in this case.

And then, finally, the size of the organization and the steps taken to discipline officers, directors and employees and agents in order to, essentially, send the message and deter recurrence of a similar event in the future. This is hard to measure. There's been some suggestion that steps were taken, employees

had left. The evidence at trial was employees left because they changed careers or because the company was sold, the local company was sold. I'm not sure how to factor [56] this in. I don't see much evidence other than suggestions here today that any high level corporate officials were held accountable to any degree for this crime.

The next statute that I look to is Section 3553, which is, of course, the statute that sets forth all of the factors that should be considered in determining an appropriate sentence. The first factor there is the nature and circumstances of the offense and the characteristics of the defendant.

In terms of evaluating this factor, which I think is critical, I believe it's important to consider the length of the violation, 762 days. That's a very long time. And given that the jury has ruled that the Defendant was illegally storing hazardous materials, the fact the company stored them for this long is a factor that increases the company's culpability, in my view.

Second circumstance of this offense is that it was released into a densely-populated community and was not discovered for a period of three weeks. In other words, the mercury was allowed to just sit on the ground after the vandals invaded the building. That neglectful attitude toward the property in general and neglect for the storage facility and the mercury itself [57] is something that should be considered.

The densely-populated nature of the community has to be considered. The company's decision to store this hazardous waste in a very densely-populated community with neighborhoods with children in them nearby; with complete inattention to the security

of the facility in terms of fencing and guards; the evidence at trial of gaping holes in the fences; security guards that were, at best, part-time and not terribly effective; homeless people sleeping on the property; overwhelming evidence of vandalism and graffiti and so forth indicates that the company, essentially, treated the facility, the physical facility of the site as kind of out-of-sight out-of-mind. And combined with the decision to store hazardous waste in that facility is a factor that should be considered.

Next, the company, by the manner in which the mercury was stored and transported, placed in danger its own employees. The facility it was stored in was really appalling, frankly.

There was also a danger to the emergency response workers by not informing the local emergency responders of the existence of the hazardous materials. Had they been called and had they been first responders [58] to the site, they would not have known what they were walking into, and so the emergency responders were endangered.

Also, the fact that the company employees had direct knowledge of the storage and of the existence of the problems. As I mentioned, the decision not to notify the Pawtucket Fire Department and the manner in which the company attempted to make a notification and not calling DEM and not notifying the fire department are factors that weigh against the company. All of these factors weigh in favor of a substantial penalty.

Weighed against that, however, and should be factored in, is the fact that the company, once it got on site, and thereafter, took a number of important and positive steps, including paying for the entire clean-up and attempting to be of assistance to the

local families that were victims. So that should be considered as somewhat of a counter-balancing factor.

The second 3553 factor is the seriousness of the offense. Mr. Donnelly spoke to this, as did Mr. Tarantino. It's my view that Congress intended RCRA criminal violations to be treated as very serious matters. As I indicated at the beginning, that's indicated somewhat by the level of fines that Congress attached to these types of violations.

[59] So it's my view that this intent of Congress about the seriousness of the offense has to be considered in determining the appropriate penalty. And beyond that, I think my own sense is that it is a serious crime. I think Mr. Donnelly hit the nail on the head, frankly, when he said who knows how many other places we drove by this morning that are storing hazardous waste.

Congress was trying to get a handle on a problem that is maybe a bit hidden and deal with it in a very aggressive and serious fashion. And so that's my sense of the seriousness of the offense.

But the seriousness of the offense is also, I won't repeat it, but is also gauged by the effect on the community and the children; the housing complex that was close by; the fact that there were schools nearby. All of these things go to an evaluation of the seriousness of the offense.

Now, the third factor under Section 3553 is a penalty that affects deterrence. Deterrence is both, as we know, general deterrence and specific deterrence. So the penalty needs to be enough to dissuade this company from ever engaging in this type of conduct again. But beyond that, it needs to be enough to get the attention of other companies who might be doing

the [60] same sort of thing. I mean, in a rough way, this is no different than sentencing someone who is on the streets of Providence with a gun. You want to send a message to other people who might be thinking of using guns in connection with drug transactions or illegally possessing firearms on the streets of Providence, you want to send a message to them that you will pay a serious price if you do that. And there's no difference between that and this case. It is important to send a message to all companies who may be illegally storing hazardous waste that a serious price will be paid if you get caught. That's what deterrence is all about.

The fourth factor is protection of the public. And this, of course, ties into deterrence. If the penalty has a substantial deterrent effect, the public will be protected. So for example, a strong sentence will send a message that, perhaps, will persuade a company like Southern Union to make sure a facility like this has all its fences repaired and has adequate guards and local responders are notified.

I also think that the protection of the public factors in to some degree in the community service portion of the sentence that I'm going to hand out in a moment. That is to say that the public is going to be [61] protected, I think, by some of the direct impact requirements that I intend to impose.

Other factors detailed in 3553 are not—such as education and that sort of thing don't really apply, but a couple of other things do merit mention.

The requirement that the sentence not result in disparities, unwarranted disparities, is really hard, frankly, to get a handle on. I'm convinced after looking at all of these cases that sentencing in

criminal environmental matters is a very individualistic task. And there's not really—it's not really easy to make direct case-to-case comparisons.

So I'm not persuaded that anything about this case means that the daily fine should be in the hundreds or in the tens of thousands, I think, as compared to these other cases. So I don't think that's a factor that weighs heavily.

And finally, the parsimony factor, that is that the sentence be sufficient but not greater than necessary, I think I have factored that in, and I believe the sentence that I'm going to impose adequately accounts for that.

All right. At this time then I'm going to impose sentence so the Defendant may rise.

[62] In the matter of the United States versus Southern Union, the Defendant is sentenced to a term of probation of two years. As a condition of probation, the Defendant will be required to submit evidence of an existing and ongoing corporate-wide environmental compliance program. The Defendant will be required to submit to an environmental audit that is sufficient to ensure that the Defendant has fully prepared and has an ongoing plan for corporate-wide environmental compliance. I'm not going to order that the Defendant retain a consultant as suggested by the Government, but I am going to allow the Defendant to craft—it may be that what you want to do is employ a consultant for this purpose, but there needs to be an audit and that audit needs to have sufficient indicia of independence and be sufficient to assure the Office of Probation that the compliance program I have referred to is in place and ongoing.

I'm also going to impose a series of community service obligations on the Defendant, and I will detail those now. But before I do that, I want to tell you my intent with respect to the fine.

I'm going to impose a fine in this case of $6 million. The basis of the fine, frankly, is to replicate the cost of clean-up. So I think it's an [63] appropriate measure for a fine.

Now, the community service. The community service I'm going to impose comes to a total financial obligation of $12 million. So in combination, the total financial burden upon the company will be $18 million.

The community service will be paid as follows: I'm going to require that $1,000,000 in financial contributions be made immediately as follows: $200,000 to the American—the Rhode Island Chapter of the American Red Cross for use and restricted to use in Rhode Island and for the Rhode Island Chapter, not the national; second, a $200,000 payment to the Rhode Island Environmental Response Fund of DEM; third, a $200,000 payment to Hasbro Children's Hospital for equipment and materials related to testing and treatment of children exposed to hazardous chemicals and hazardous waste; a $200,000 payment to the Distressed Communities Recreation and Acquisition Fund to be used in the community of Pawtucket for the purposes of that fund, acquiring recreational sites; and $200,000 to the Pawtucket Fire Department for the acquisition of materials to be used in the response to hazardous chemical spills such as this one.

That, of course, those last two items, the [64] Recreation Acquisition Fund and the Pawtucket Fire

Department, in my view, go directly to the assistance of the community of Pawtucket. To the extent that taxpayer funds do not have to be used for acquiring fire apparatus, it's to the taxpayers' benefit.

Finally, $11 million will be paid into an endowed fund to be managed by the Rhode Island Foundation for grants in the field of environmental education, environmental remediation, conservation and children's health related as much as possible to exposure to toxins, toxic waste, hazardous waste, heavy metal hazardous waste.

I envision the fund managed by the Rhode Island Foundation to be on the model of the fund that was created in the Blue Cross deferred prosecution agreement and would expect it to function in, essentially, the same way.

My purpose in creating that endowed fund is to pay forward, if you will, the damage that's been done to the community and to benefit people in the State of Rhode Island in a manner that relates to this crime in perpetuity. I think the model is a good one, and I think it gives the benefit and the payback to the people of Rhode Island.

So that completes my recitation of the sentence. [65] There is a requirement of a $100 special assessment for the count of conviction. I'm sure I'm forgetting something. Is it $400? Four hundred dollars special assessment.

The Defendant is aware of its right to appeal, and I think you know that the time for filing the appeal is relatively short so if you wish to appeal you need to file that notice immediately.

MR. TARANTINO: I know, your Honor.

THE COURT: All right. Now, finally, the stay. I'm going to stay all of the penalties I have just described, both the fine and all of the payments as part of the community service obligation, all of these will be stayed. The fine will be—I'm not going to require that you deposit the money into the Registry of the Court. I think the company is solid financially. I don't have any real worries about that. However, interest will apply.

MR. TARANTINO: Your Honor, may I just ask a question so I'm absolutely clear? Is interest applying on the fine and—

THE COURT: On the fine.

MR. TARANTINO: Only on the fine.

THE COURT: Only on the fine.

MR. TARANTINO: Thank you.

[66] THE COURT: Any other questions?

MR. TARANTINO: Your Honor, is it going to be the normal statutory interest that would be in the federal—

THE COURT: That's my understanding. Statutory interest rate.

MR. TARANTINO: Thank you, your Honor.

THE COURT: Any other questions? Mr. Donnelly, anything?

MR. DONNELLY: No, your Honor. Thank you very much.

THE COURT: All right. Then we'll be in recess. Thank you.

(Court concluded at 11:45 a.m.)

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

JUDGMENT IN A CRIMINAL CASE
Case Number: 1:07CR00134-01S
USM Number: N/A

UNITED STATES OF AMERICA

v.

SOUTHERN UNION COMPANY

John A. Tarantino, Esq., Gerald J. Petros, Esq., Patricia K. Rocha, Esq., Daniel J. Fetterman, Esq., Alexandra K. Callam, Esq.
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s):__.

[ ] pleaded nolo contendere to count(s)__which was accepted by the court.

[✓] was found guilty on count(s) I of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense
42 U.S.C. § 6928(d)(2)(A)	Storing a Hazardous Waste without Permit—Waste Liquid Mercury

Date Offense Concluded	Count Number(s)
October 19, 2004	I

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[✓] The defendant has been found not guilty on count(s) II and III of the Indictment.

[ ] Count(s)__[ ] is [ ] are dismissed on motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

October 2, 2009
Date of Imposition of Judgment

[Illegible]
Signature of Judicial Officer

WILLIAM E. SMITH
United States District Judge
Name & Title of Judicial Officer

10/7/09
Date

PROBATION

The defendant is hereby placed on probation for a term of 2 years.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days after placement on probation and at least two periodic drug tests thereafter as determined by the Court.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable)

[ ] The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable)

[ ] The defendant shall cooperate with the collection of DNA as directed by the probation officer. (Check, if applicable)

[ ] The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable)

[ ] The defendant shall participate in an approved program for domestic violence. (Check, if applicable)

If this judgment imposes a fine or a restitution, it is a condition of probation that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow instructions of the probation officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony

unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendants criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FOR OFFICIAL USE ONLY—
US PROBATION OFFICE

Upon a finding of a violation of probation or supervised release, I understand that the Court may (1) revoke supervision or (2) extend the term of supervision and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand them and have been provided a copy.

(Signed)

_____ _____

Defendant Date

_____ _____

US Probation Officer/Designated Witness Date

SPECIAL CONDITION(S) OF PROBATION

In addition, the defendant shall comply with the following special condition(s):

1. Defendant will be required to submit evidence of an existing and ongoing corporate-wide environmental compliance plan.

2. Defendant shall submit to an environmental audit to ensure that the defendant has an ongoing plan for corporate wide environmental compliance. The auditor must be independant yet can be employed as a consultant by the defendant. The auditor must consult with the U.S. Probation Department to ensure compliance.

3. Community service in the total amount of twelve million dollars ($12,000,000.00) no interest.

   *One million ($1,000,000.00) of which to be allotted in the amount of two hundred thousand dollars ($200,000.00) to the following:

   - Rhode Island Chapter of the American Red Cross restricted to use in RI
   - RI DEM Environmental Response Fund
   - Hasbro Children's Hospital for the equipment and testing of children exposed to hazardous chemicals and waste
   - Distressed Communities Recreation and Acquisition Fund to be used in Pawtucket, RI
   - Pawtucket Fire Department for acquisition of materials to be used in response to hazardous chemical spills

*Eleven million ($11,000,000.00) to an endowed fund to be managed by the Rhode Island Foundation for grants in the field of environmental education, environmental remediation, conservation and children's health issues related as much as possible to exposure to toxins, hazardous waste, and heavy metal hazardous waste. It is envisioned that this fund will be modeled after the Blue Cross deferred prosecution agreement.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 6.

	Assessment	Fine	Restitution
Total	$400.00	$6,000,000.00	$0.00

[ ] The determination of restitution is deferred until . An *Amended Judgment in a Criminal Case* (AO245C) will be entered after such determination.

[ ] The defendant shall make restitution (including community restitution) to the following payees in the amount listed.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid.

Name of Payee	*Total Amount of Loss
Amount of Restitution Ordered	Priority Order or % of Payment

TOTALS:

[ ] If applicable, restitution amount ordered pursuant to plea agreement. $_____

[✓] The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

  [ ] the interest requirement is waived for the [ ] fine and/or [ ] restitution.

  [ ] the interest requirement for the [ ] fine and/or [ ] restitution is modified as follows:

---

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A [✓] Lump sum payment of $6,000,400.00 due immediately.

[ ] not later than __, or

[ ] in accordance with [] C, [] D, [] E, or [] F below; or

B [ ] Payment to begin immediately (may be combined with [] C, [] D, or [] F below); or

C [ ] Payment in equal__ (e.g., weekly, monthly, quarterly) installments of $__ over a period of__ (e.g., months or years), to commence __ (e.g., 30 or 60 days) after the date of this judgment; or

D [ ] Payment in equal __ (e.g., weekly, monthly, quarterly) installments of $__ over a period of__ (e.g., months or years), to commence __(e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E [ ] Payment during the term of supervised release will commence within __ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F [ ] Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Pris-

ons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[ ] Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

No. 11-94

IN THE

Supreme Court of the United States

SOUTHERN UNION COMPANY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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January 12, 2012

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QUESTION PRESENTED

Whether the Fifth and Sixth Amendment principles that this Court embraced in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and its progeny, apply to the imposition of criminal fines.

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Southern Union Company states that it has no parent corporation and that no publicly held corporation owns ten percent or more of its stock. New England Gas Company is a division of Southern Union Company. The Company has entered into a merger agreement with Energy Transfer Equity, L.P. ("ETE"), a publicly traded partnership, pursuant to which ETE will acquire the Company.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 630 F.3d 17. Its order denying the petition for rehearing en banc (Pet. App. 49a-50a) is unreported. The opinion of the district court (Pet. App. 39a-48a) is reported at 2009 WL 2032097.

JURISDICTION

The court of appeals issued its decision on December 22, 2010. Pet. App. 1a. The petition for a writ of certiorari was timely filed on July 15, 2011. This Court granted certiorari on November 28, 2011, and has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person shall be held to answer for a . . . crime, unless on a presentment or indictment of a Grand Jury . . . nor [shall] be deprived of life, liberty, or property, without due process of law . . . ."

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

42 U.S.C. § 6928 provides, in relevant part:

> (d) Criminal penalties. Any person who – . . .
>
> (2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter –
>
> (A) without a permit . . .

shall, upon conviction, be subject to a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed two years (five years in the case of a violation of paragraph (1) or (2)), or both.

STATEMENT OF THE CASE

This case raises the question whether the principle that this Court recognized and applied to sentences of incarceration in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and its progeny, applies equally to the imposition of criminal fines. At the outset, the Court might wonder what the argument could be that the *Apprendi* principle does *not* apply to criminal fines, given that this Court's explicit holding in *Apprendi* was that any fact that increases the "penalty" for a crime must be submitted to the jury and proved beyond a reasonable doubt, and criminal fines are unquestionably "penalties." Indeed, prior to the decision below, federal and state courts uniformly held (or assumed) that *Apprendi* applies to the imposition of criminal fines. Even the United States agreed that the *Apprendi* principle applies to fines.

The decision below is the first to hold otherwise. It did so based on the court of appeals' view that this Court's opinion in *Oregon* v. *Ice*, 555 U.S. 160 (2009), announced a whole new methodology that fundamentally narrowed the *Apprendi* doctrine and also suggested that a court can use non-jury fact-finding to impose a fine that exceeds the maximum fine set by the legislature, which is what happened in this case. As shown below, this reading of *Ice*, a case which did not involve a criminal fine, is fundamentally flawed and ignores the fact that *Ice* was an exceedingly narrow ruling. In particular, the court of appeals' historical understanding was at a minimum

incomplete, and in all events did not support its conclusion that fines are outside the scope of *Apprendi*.

This Court should reverse the court of appeals' holding because it would deprive criminal defendants of their fundamental jury trial rights in cases involving fines, and should vacate the fine imposed in this case (which was 360 times greater than that authorized by the jury's verdict).

A. Factual Background.

Southern Union, a diversified natural gas company, was found guilty by a jury of a single count of knowingly storing mercury without a permit in violation of 42 U.S.C. § 6928(d)(2)(A), a provision of the Resource Conservation and Recovery Act ("RCRA").[1] The mercury had been collected by a division of Southern Union, New England Gas Company, in connection with an environmentally-favorable program to replace mercury seal gas pressure regulators in customers' homes with non-mercury regulators. Pet. App. 3a. The charges against Southern Union resulted from an unfortunate incident in which vandals illegally entered a storage facility owned by Southern Union in Pawtucket, Rhode Island, broke into a locked cabinet that contained liquid mercury, and spilled some of it on the property as well as at a nearby apartment complex.

After the spill was discovered, Southern Union fully cooperated with local and state officials and the Red Cross to remediate the spill's effects and to compensate the residents of the apartment complex who

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[1] Southern Union was acquitted on two other counts, which are not at issue here.

were temporarily displaced. The company placed residents in hotels and retained environmental experts to fully remediate the residential property and the storage facility. In all, Southern Union spent more than $6 million in the remediation efforts. *Id.* at 6a; J.A. 148.[2] In addition to the remediation costs, Southern Union settled all civil suits brought by the residents of the affected apartment complex. This incident was the first time in Southern Union's 80-year history that it was even charged with any crime, much less convicted of one.

B. Proceedings Below.

The indictment charged Southern Union with storing mercury without a permit "'[f]rom on or about September 19, 2002 until on or about October 19, 2004.'" Pet. App. 25a; J.A. 104. As the court of appeals acknowledged, Southern Union's "prime defense at trial was that the mercury was not a waste, but rather was a commercial chemical product that the company intended to recycle," as it had previously done. Pet. App. 7a. Under EPA regulations, liquid mercury is a "commercial chemical product[]" that is only regulated as a waste "if and when" it is "discarded or intended to be discarded." 40 C.F.R § 261.33. Therefore, even though mercury is a hazardous substance, it is also a commercial chemical product that can be stored for any length of time if it is being held for eventual use or recla-

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[2] The district court acknowledged at the sentencing hearing that Southern Union "did step forward and attempt to do everything that it could to alleviate losses suffered by the individuals who were affected by the spill in terms of providing housing, providing food." J.A. 147; *see also id.* at 150-51 (acknowledging that Southern Union "pa[id] for the entire clean-up and attempt[ed] to be of assistance to the local families that were victims").

mation. Such storage requires no hazardous waste permit because the material remains a product, not a waste.

The company "presented evidence at trial from which the jury could have found that for at least some of the period of the indictment, it had treated the [liquid] mercury as a recyclable resource rather than as waste." Pet. App. 24a. For example, "Southern Union produced evidence that at several points throughout the indictment period, and as late as the summer of 2004 [shortly before the end of the period charged in the indictment], Southern Union employees discussed a potential mercury recycling project." *Id.* at 33a.[3]

The jury instructions did not direct the jury to determine the number of days or the duration of any violation that it found. The district court instead instructed the jury that in order to convict it "needed only to 'determine . . . whether at *some point* in time the liquid mercury was discarded by being abandoned' and therefore ceased to be legally held for future recycling and began to be stored as waste." Pet. App. 33a (emphasis in original); J.A. 135-36. The government did not request a special interrogatory that would have called upon the jury to determine the number of days or duration of any violation. The general verdict form simply tracked the indictment and asked whether Southern Union

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[3] *See, e.g.*, C.A. App. 1456-57 (Southern Union's environmental manager testified that on July 9, 2004, only 100 days from the end of the period charged in the indictment, he prepared a request to ship the mercury to a recycler); *id.* at 2297-99 (outside contractor testified that in September 2004 – only 20 to 45 days before the end of the period charged – he discussed recycling the mercury with Southern Union's environmental manager).

was "guilty" or "not guilty." Pet. App. 25a; J.A. 140. Under RCRA, a single day's violation was sufficient for the jury to return a guilty verdict. 42 U.S.C. § 6928(d).

At sentencing, the district court applied 42 U.S.C. § 6928(d), which provides for a fine of "not more than $50,000 for each day of violation." The pre-sentence report prepared by the U.S. Office of Probation set the maximum fine for Southern Union's offense at $38.1 million, which it arrived at by multiplying the maximum daily fine of $50,000 times 762, the total number of days referred to in the indictment. Southern Union objected to this calculation on the ground that a fine of more than $50,000 would violate its constitutional rights under *Apprendi* because the jury did not determine the number of days or duration of the RCRA violation and, therefore, the maximum sentence supported by the jury's verdict was the maximum fine for a one-day violation.

The district court requested briefs on the *Apprendi* issue and produced a written decision prior to the sentencing hearing. Pet. App. 39a-48a. The government conceded that the jury was not asked to find, and did not find, a particular number or span of days of illegal storage and that therefore "the issue requires judicial fact-finding." See United States' Response to Defendant's Memorandum Concerning the Maximum Possible Fine, at 2 (June 1, 2009) (Dkt. 136) ("[T]he dispute over whether Southern Union violated the statute during that entire period or for some lesser number of days cannot be resolved by reference to the verdict."). The government also conceded that each day of violation increases the maximum fine under the statute: "Southern Union also is correct that such fact-finding would increase the statutory maximum fine authorized by [RCRA] by

$50,000 increments for each day of violation found by the Court. Under that provision, the maximum fine is $50,000 for a one-day violation, $100,000 for a two-day violation, $150,000 for a three-day violation, and so on. Each increment represents a higher statutory maximum, ..." *Id.*; see also Br. for the Appellee, United States of America at 36, *United States* v. *S. Union Co.*, No. 09-2403 (1st Cir. Apr. 7, 2010) ("U.S. First Cir. Br.") ("[e]ach daily increment represents a higher statutory maximum").

The government nonetheless argued that *Apprendi* does not apply to the imposition of criminal fines, and thus the district court was authorized to find facts that increased the available fine from $50,000 (corresponding to the one day of violation that is the maximum that can be supported by the jury's verdict) to $38 million (corresponding to 762 days of violation).

District Court Decision and Sentencing. The district court initially concluded *sua sponte* that Southern Union had waived its *Apprendi* argument because of its "failure to respond to the Court's invitation for even greater specificity in the verdict form, its assent to the use of the Indictment language, and its failure to formally place an objection on the record." Pet. App. 43a n.1. The court nevertheless addressed "the substance" of Southern Union's argument. *Id.*

On the merits, the district court "reject[ed] the notion that *Apprendi* does not apply to fines." Pet. App. 44a. Applying the *Apprendi* principle, the district court examined § 6928(d) and found that "the statutory maximum penalty" under this provision "can only be determined in any particular case after a factual finding is made concerning the number of days a defendant violated the statute." *Id.* at 45a. It

then concluded that "[b]ecause the maximum statutory penalty is tied to the length of the violation, *Apprendi* and its progeny requires the jury, and not the Court, to find the dates needed to calculate the maximum fine." *Id.*

The district court nevertheless concluded that there was no *Apprendi* violation in its finding a RCRA violation of 762 days because the "content and context of the verdict all together" indicated that the jury determined the necessary dates, Pet. App. 46a, notwithstanding the district court's instruction to the jury that it could convict if it found that Southern Union "'at *some point* in time'" began storing the mercury as waste (and thereby violated RCRA), *id.* at 33a (emphasis in original). The district court reasoned that "[f]rom the verdict form, it is clear that the jury conclusively found beyond a reasonable doubt that the Defendant's conduct ended on October 19, 2004 and that it began 'on or about' September 19, 2002." *Id.* at 46a; see also *id.* at 47a (noting that "the evidence introduced was clear . . . . that the precise date for establishing the maximum penalty is in fact September 19, 2002").

The district court therefore "set the maximum fine that may be imposed against the Defendant at $38.1 million as stated in the pre-sentence report." Pet. App. 48a; see also J.A. 146 ("In this case, the length of the violation is 762 days, which yields a maximum fine, as we have discussed, of $38.1 million."). After a sentencing hearing, the district court imposed a $6 million fine and a $12 million "'community service obligation.'" Pet App. 24a.[4] Southern Union appealed both the verdict and sentence.

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[4] The district court specifically noted at the sentencing hearing that its sentence did not include restitution. J.A. 148.

First Circuit Decision. In addition to rejecting Southern Union's challenges to the verdict, the First Circuit rejected Southern Union's challenges to the sentence. The court of appeals first held that "Southern Union adequately preserved an objection" to the fine on the ground that it was imposed in violation of *Apprendi* because Southern Union had raised this objection at sentencing. Pet. App. 24a. The court of appeals specifically noted that "[t]he prosecution did not seek the district court's waiver ruling and does not press it on appeal." *Id.* at 24a n.12; see also U.S. First Cir. Br. at 38 (the government "does . . . not press the [district] court's waiver ruling – a ruling it did not seek below").

On the merits, the court of appeals described the *Apprendi* issue as one of "initial impression" that was both "important" and "close." Pet. App. 1a-2a. The court first considered this Court's holdings in *Apprendi* and its progeny. It acknowledged that "[t]hese cases do not distinguish among types of 'penalties' or 'punishment,' leaving the broad language unglossed," but concluded that none of the cases expressly addresses whether criminal fines are encompassed within the *Apprendi* rule. *Id.* at 27a.

It then concluded that "the *Apprendi* rule does not apply to the imposition of statutorily prescribed

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("The fourth [sentencing] factor [the court must consider] is restitution, and I don't see that to be a factor at all in this case."); *see also* J.A. 163 (judgment form listing the amount of restitution to be paid by Southern Union as $0). The court specified that the $12 million community service obligation would be paid to several local organizations and into an endowed fund to be managed by the Rhode Island Foundation for grants in the fields of environmental education, remediation, and conservation. J.A. 154-55. None of this community service obligation would be paid to the residents of the apartment complex, with whom Southern Union had reached a settlement.

fines," Pet. App. 2a, relying on two aspects of this Court's opinion in *Oregon* v. *Ice*, 555 U.S. 160 (2009). This Court in *Ice* rejected an *Apprendi* challenge to a state sentencing provision that allowed judges to find facts justifying the imposition of consecutive, rather than concurrent, sentences of incarceration following the jury's verdict convicting the defendant of multiple crimes. *First*, the court of appeals relied on a reference in *Ice* to criminal fines, although it conceded the reference was "dicta." Pet. App. 28a. The court of appeals concluded that this dictum was entitled to "great weight" and characterized it as "an express statement . . . that it is inappropriate to extend *Apprendi* to criminal fines." *Id.* at 28a-29a.

Second, the First Circuit relied on this Court's consideration in *Ice* of "the history at common law of the practice . . . challenged," which the court of appeals viewed as a "logic and method" that "alter[ed] any previous broad understanding of *Apprendi*." Pet. App. 28a. Applying what it viewed to be *Ice*'s "reasoning and logic," the court of appeals stated that "it is now highly relevant that, historically, judges assessed fines without input from the jury." *Id.* at 30a. Indeed, the court of appeals concluded that the government presented "strong evidence of historic practice that at common law, judges' discretion in imposing fines was largely unfettered." *Id.* at 31a.

The First Circuit also held, "[i]n the interest of judicial economy and efficiency," that "if we are wrong and if *Apprendi* does apply to criminal fines, it would be necessary to remand for resentencing" because "[t]he district court erred in holding, despite the absence of a special interrogatory, that the jury necessarily found beyond a reasonable doubt that Southern Union had violated RCRA during all or nearly all of the date range in the indictment." Pet.

App. 32a-33a. The court of appeals noted that the government "essentially concedes and we agree" that "the jury did not necessarily determine the number of days of violation." *Id.* at 33a; see U.S. First Cir. Br. at 38 ("[T]he government concedes that the [district] court's verdict-based ruling reads too much into the 'on or about' dates and the quoted instruction. Put simply, the jury was not asked to find a particular number or span of days of illegal storage."). The court also "reject[ed] the prosecution's suggestion that the evidence was so overwhelming that no reasonable jury could conclude other than that the mercury was treated as waste throughout the period in the indictment." Pet. App. 34a. In short, the court of appeals concluded that "any error under *Apprendi* was not harmless." *Id.* at 2a.

The First Circuit denied rehearing and rehearing en banc.

SUMMARY OF ARGUMENT

1. Nothing in this Court's reasoning or language in *Apprendi*, or in its subsequent decisions, provides a basis upon which to distinguish fines from incarceration for Fifth and Sixth Amendment purposes. *Apprendi*'s core holding was based on an extensive historical analysis, which concluded that judges during the years surrounding our Nation's founding did not make factual determinations that elevated sentences. In reaching this conclusion, the Court relied on historical evidence indicating that judges had very little sentencing discretion with respect to felonies because substantive criminal laws generally were "sanction-specific," 530 U.S. at 479, but also relied on historical evidence indicating that sentencing for misdemeanors – which were commonly punished by fines – was "substantially more depen-

dent on judicial discretion," *id.* at 480 n.7. Based on this evidence, the Court concluded that the notion of judicial fact-finding being used to expand a fine or other punishment range beyond what was explicitly set by a legislature would have been unknown to the Founders.

This Court's historical analysis in *Apprendi* makes plain that the *Apprendi* principle applies to criminal fines. This Court specifically considered and relied upon historical sentencing practices concerning fines in deciding *Apprendi*. Because *Apprendi* was derived in part from historical evidence and practices concerning the extent of judicial discretion in setting fines, the principle naturally applies to them. Indeed, this Court's conclusions in *Apprendi* about the Founders' understanding of the Sixth Amendment's jury trial guarantee are arguably on a *stronger* historical footing with respect to fines than with respect to incarceration because fines were one of the most common forms of criminal punishment at the time of the Founding, while incarceration was rare. Moreover, *Apprendi*'s discussion of historical sentencing practices concerning fines confirms that the fine imposed by the district court here violates the Constitution. The district court found facts in order to increase the statutorily set maximum penalty under a fine-per-day provision in a criminal law, rather than to calibrate a sentence under a discretionary regime – a form of judicial fact-finding that had no analog at common law and that usurps the jury's function as defined by the Constitution and this Court in *Apprendi*.

The express language of *Apprendi* confirms that it applies to the imposition of criminal fines. That language does not speak only to incarceration; indeed, there would have been no principled basis or

historical evidence for doing so. Rather, this Court's formulation of its holding encompasses punishment and penalties broadly, without any qualification or limitation. This Court's restatement of these principles in *Apprendi*'s progeny further confirms that it applies to all forms of criminal punishment.

Moreover, this Court already has applied the *Apprendi* principle to criminal fines. In *United States v. Booker*, 543 U.S. 220 (2005), this Court extended its holding in *Apprendi* to a context that indisputably involved criminal fines: the Federal Sentencing Guidelines. Those Guidelines address the imposition of fines, and this Court's holding in *Booker* applies to the Guidelines *in toto* – not merely to the portions that address sentences of incarceration. The remedy that this Court imposed – rendering the Guidelines advisory rather than mandatory – applies across the board.

The clear conclusion that *Apprendi* applies to fines is further confirmed by the fact that until the decision below, federal courts of appeals, federal district courts, state supreme courts, and commentators uniformly held (or assumed) that the principle applies to fines. Indeed, the United States itself apparently concurred in this view for nearly a decade after *Apprendi* was decided.

The fine imposed here violated *Apprendi* because the district court made a factual determination that increased the available sentence beyond the single-day fine that was the most that could be supported by the jury's verdict. Indeed, the district court made an even more fundamental Fifth and Sixth Amendment error by effectively determining that Southern Union was *guilty* of violating RCRA for 762 days, when the jury verdict could only support a single day of violation. Southern Union's right to trial by jury

entitled it to have the jury determine for what days, if any, within the indictment period the government proved beyond a reasonable doubt all of the elements of the violation charged. The district court impermissibly displaced the jury by making that finding of guilt for 761 of the 762 days identified in the indictment.

2. The court of appeals erred in holding that this Court's reasoning in *Oregon* v. *Ice*, 555 U.S. 160 (2009), suggests that the plainly-stated *Apprendi* principle does not apply to the imposition of criminal fines. *Ice* did not involve a criminal fine and is properly understood as a narrow decision that merely declined to extend the *Apprendi* principle to the multiple offense context.

The court of appeals erred in relying on cursory dictum in *Ice* concerning fines. This dictum is not entitled to any weight because this Court is not bound by its prior, off-hand statement on a point that was not "'fully debated,'" which is the case here. See *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 737 (2007) (plurality opinion). Moreover, even if the dictum in *Ice* is considered at all, it cannot remotely qualify as controlling authority on the question presented because the meaning of this Court's fleeting reference to fines is at a minimum unclear and in all events appears to address very different situations that are not at issue here.

The court of appeals also erred in holding that this Court's reliance in *Ice* on historical sentencing practices was a new "logic and method" that "alter[ed] any previous broad understanding of *Apprendi*." Pet. App. 28a. Yet even if *Ice* did break new methodological ground, the First Circuit's conclusion that judges historically had unfettered

discretion to determine fines without input from the jury is incomplete, if not incorrect. Early American statutes, for example, demonstrate that (1) there was variation in the discretion accorded to judges with respect to fines, and (2) juries were sometimes authorized to set fines. This latter point squarely distinguishes this case from *Ice* because the sentencing practice at issue here (the imposition of fines) was *not* performed exclusively by judges.

Further, even if the First Circuit were also correct that judges historically determined fines and had unfettered discretion to do so, the court of appeals' conclusion that fines are outside the scope of the *Apprendi* principle does not follow. This Court's derivation of the *Apprendi* principle was in part based on its own historical conclusion that judges had considerable discretion with respect to fines. Here, by contrast, the statute does *not* give the court discretion to find the number of days of violation and thus the maximum available fine. Because the *Apprendi* rule was derived from historical sentencing practices concerning the extent of judicial discretion with respect to a variety of criminal punishments, including fines, there is no basis upon which to distinguish fines from incarceration for *Apprendi* purposes.

3. The court of appeals was wrong in holding that defendants subject to criminal fines do not merit the same constitutional protections as defendants subject to incarceration and other criminal penalties. Criminal defendants subject to fines are entitled to other fundamental constitutional safeguards under the Fifth and Sixth Amendments. In addition, the drafters of the Bill of Rights included a specific provision, the Excessive Fines Clause of the Eighth Amendment, to protect criminal defendants from

government abuse of power with respect to the imposition of fines. These protections dispel any notion that fines are a less significant form of criminal punishment that do not merit full constitutional safeguards.

Finally, a holding that the *Apprendi* principle does not apply to fines would have widespread impact and adverse practical consequences. Fines are a significant element of criminal sentencing, for both corporations and individuals. Elimination of Fifth and Sixth Amendment constitutional guarantees for fines would undermine the efficacy of the justice system by making innocent defendants more likely to plead guilty. In addition, eliminating fines from the scope of *Apprendi*'s protections would have thorny implications for application of the Federal Sentencing Guidelines because it would mean that there was no need for this Court in *Booker* to have made advisory the Guideline provisions that address fines.

ARGUMENT

I. THE SENTENCE VIOLATED SOUTHERN UNION'S FIFTH AND SIXTH AMENDMENT RIGHTS.

A. The *Apprendi* Principle Applies To Criminal Fines.

There is no basis upon which to distinguish fines from incarceration for Fifth and Sixth Amendment purposes. Nothing in the reasoning or language of *Apprendi* itself, or in the Court's subsequent decisions, supports such a radical retrenchment of the scope of the *Apprendi* principle.

1. The *Apprendi* Decision.

This Court held in *Apprendi* that "any fact" other than the fact of a prior conviction "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. It later clarified that the "statutory maximum" for *Apprendi* purposes is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely* v. *Washington*, 542 U.S. 296, 303 (2004) (emphasis in original). *Apprendi*'s core holding was based on an extensive historical analysis. In particular, the Court rejected the notion that a factual determination that elevates a sentence can be labeled a mere "sentencing factor" because "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." *Apprendi*, 530 U.S. at 478 (footnote omitted).

In support of the historical conclusion that judges during this period did not make factual determinations that elevated sentences, *i.e.*, did not determine "sentencing factors" that were exempt from the jury trial and reasonable doubt requirements, the Court relied on historical evidence demonstrating that judges had "very little explicit discretion in sentencing" with respect to felonies because substantive criminal laws were "sanction-specific," *i.e.*, they "prescribed a particular sentence for each offense." *Id.* at 479. In addition, with respect to sentencing for misdemeanors during this period, the Court explained that judges likewise did not determine facts that elevated a sentence above that permitted

by the jury's verdict because sentencing for misdemeanors – which were generally punishable by "fines or whippings" and only rarely by incarceration – was "substantially more dependent on judicial discretion." *Id.* at 480 n.7. Indeed, the Court expressly noted that judges' discretion when imposing fines was subject only to the limitations that the fines "be proportionate to the offense, and, by the 17th century, that [they] not be 'cruel or unusual.'" *Id.* (quoting J.H. Baker, *Introduction to English Legal History* 584 (3d ed. 1990)). In other words, the Court concluded that there typically were no statutory constraints on judges in imposing fines during this period and, as a result, found that the notion of judicial fact-finding being used to expand a fine range set by a legislature would have been unknown to the Founders.[5]

The Court also derived the *Apprendi* principle from historical sentencing practices in the United States following the adoption of the Bill of Rights. Specifically, the Court noted that there was a "19th century shift in this country from statutes providing fixed-term sentences to those providing judges *discretion within a permissible range.*" *Id.* at 481 (emphasis added). While acknowledging that "judges in this country have long exercised discretion" in imposing criminal sentences, the Court emphasized that judges' discretion has always been employed

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[5] This discussion echoed the Court's prior conclusion in *Jones v. United States*, 526 U.S. 227 (1999), that it is "unsurprising" that there are no statutes of the pre-Founding period that exemplify "the distinction between elements and facts that elevate sentencing ranges," given "the breadth of judicial discretion over fines and corporal punishment" in misdemeanor cases and "the norm of fixed sentences in cases of felony." *Id.* at 244-45 (citing sources describing the practices in both England and the colonies).

"*within statutory limits* in the individual case." *Id.* (emphasis in original) (citing *Williams* v. *New York*, 337 U.S. 241, 246 (1949)).

The Court concluded that *all* of this historic evidence pointed to "a single, consistent conclusion: The judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury." *Id.* at 483 n.10. That is, based on this "historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided," this Court concluded in *Apprendi* that the proper understanding of the Sixth Amendment jury trial guarantee is that it does not permit "a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.* at 482-83 (emphasis in original).

2. The Historical Underpinnings Of The *Apprendi* Principle Foreclose Any Argument That The Principle Does Not Apply To The Imposition Of Criminal Fines.

This Court's extensive historical analysis in *Apprendi* makes plain that the *Apprendi* principle applies to criminal fines. As shown, this Court specifically considered and relied on historical sentencing practices concerning fines in deriving the *Apprendi* principle. See *Apprendi*, 530 U.S. at 480 n.7 (explaining that sentencing practices at the time of the Founding concerning fines and other punishments for misdemeanors provided evidence for the Court's conclusion that the Sixth Amendment jury trial guarantee precludes judges from determining

facts that expose the defendant to a punishment that exceeds the maximum he would receive if punished pursuant to the facts reflected in the jury verdict alone). In *Jones*, the Court drew this same link between historical sentencing practices concerning the imposition of fines and the principle that it later adopted in *Apprendi*. 526 U.S. 227, 244 (1999).

Justice Thomas' concurring opinion in *Apprendi* further relied upon evidence concerning the imposition of fines in documenting the *Apprendi* principle's historic foundations. See, *e.g.*, 530 U.S. at 514 (Thomas, J., concurring) (citing the court's reasoning and holding in *United States* v. *Woodruff*, 68 F. 536, 538 (Kan. 1895), which overturned a criminal fine); *id.* at 505 (citing *Ritchey* v. *State*, 7 Blackf. 168, 169 (Ind. 1844)), which held that an indictment for arson must allege the value of the property destroyed because the statute set the fine based on the property's value). Indeed, in explaining the "original understanding" of facts that are elements of a criminal offense, Justice Thomas employed an example involving a criminal fine, rather than incarceration, as the form of punishment: "if the legislature, rather than creating grades of crimes, has provided for setting the *punishment* of a crime based on some fact – such as a *fine* that is proportional to the value of stolen goods – that fact is also an element." *Id.* at 501 (emphasis added).

In sum, both the majority opinion in *Apprendi* and Justice Thomas' concurring opinion confirm that the historical practices from which the *Apprendi* principle is derived included practices involving the imposition of criminal fines. Because the *Apprendi* principle is derived in part from historical evidence and practices concerning the extent of judicial discretion in setting fines, the principle naturally

applies to fines. That is, there is no separate common law history concerning the imposition of fines – as distinct from the imposition of incarceration or other forms of punishment – that could lead to a different interpretation of the Fifth and Sixth Amendments as applied to fines.

Indeed, this Court's conclusions in *Apprendi* about the Founders' understanding of the Sixth Amendment's jury trial guarantee are arguably on a *stronger* historical footing with respect to fines than with respect to incarceration (which was at issue in that case). Fines were one of the most common forms of criminal punishment at the time of our nation's Founding, while incarceration was a much less prevalent form of punishment. In both England and the colonies, fines were one of "the two main forms of noncapital punishment" at the time the Bill of Rights was drafted (the other being corporal punishments such as "whippings"), while imprisonment did not emerge as a common penological practice in the United States until the late eighteenth and the early nineteenth century.[6] See also *Graham* v. *Florida*,

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[6] Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About* Apprendi, 82 N.C. L. Rev. 621, 641-42 (2004); *see also id.* at 642-43 (noting that some States "initially resisted imprisonment as a punishment" and "a few did not change their practices at all" until after the Civil War); Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 Am. J. Legal Hist. 326, 329, 350 (1982) (noting that fines were "overwhelmingly the most common of the non-capital punishments" in the colonies, and that "imprisonment, although provided for as a punishment in some colonies, was not a central feature of criminal punishment until a later time"); Judge Nancy Gertner, *Juries and Originalism: Giving "Intelligible Content" to the Right to a Jury Trial*, 71 Ohio State L.J. 935, 939 (2010) ("Scalable punishments, punishments involving a term of

130 S. Ct. 2011, 2045 (2010) (Thomas, J., dissenting) (noting that "crimes in the late 18th-century colonies generally were punished either by fines, whipping, or public 'shaming,' or by death, as intermediate sentencing options such as incarceration were not common").

Thus, the *Apprendi* principle derives from sentencing practices at the time of the Founding, and those practices primarily involved the imposition of capital punishment, fines and various forms of corporal punishment. It therefore would be anomalous indeed for this Court to adopt a rule that the *Apprendi* principle applies to incarceration (a form of punishment with which the Founders had little familiarity), but does not apply to criminal fines (a form of punishment with which the Founders were intimately familiar).

Moreover, this Court's discussion in *Apprendi* of historical sentencing practices concerning fines confirms that the fine imposed by the district court here violates the Constitution. As noted, this Court concluded that common law judges exercised nearly unfettered discretion to impose fines as punishment for misdemeanors, 530 U.S. at 480 n.7, and cited this practice as one that the Founders would have understood to be consistent with the Sixth Amendment jury trial guarantee because judges exercising such discretion did not usurp the jury's role or exceed any statutory limits set by the legislature, *id.* at 482 (noting "the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided"). That historical practice, however, bears no resemblance to what the district court

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years, were not common until the end of the eighteenth century with the growth of penitentiaries.").

did here: find facts that the jury did not find, and then use those purported facts to impose a fine that exponentially exceeds the maximum statutory penalty authorized by the jury's verdict alone. In other words, the judicial fact-finding that the district court engaged in here – finding facts in order to increase the statutorily set maximum penalty under a fine-per-day provision in a criminal law, rather than to calibrate a sentence under a discretionary regime – had no analog at common law.

Unlike the imposition of a fine in the absence of a statutory constraint, the district court blatantly usurped the role of the jury to set the parameters of the available punishment. Using a preponderance of the evidence standard, the district court found facts that caused it to impose a fine greater than the maximum fine that could be levied under RCRA based on the facts that the jury found beyond a reasonable doubt. Thus, the district court's imposition of the fine against Southern Union transgressed this Court's fundamental holding in *Apprendi* that "[t]he judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury." *Id.* at 483 n.10.

3. The Express Language Of *Apprendi* And Its Progeny Confirms That The *Apprendi* Principle Applies To The Imposition Of Criminal Fines.

This Court's language in *Apprendi* itself does not speak only to incarceration. This Court's formulation of its holding encompasses punishment and sentencing broadly, without any qualification or limitation. See, *e.g.*, *Apprendi*, 530 U.S. at 490 (holding that "any fact" other than the fact of a prior conviction "that increases the *penalty for a crime* beyond the prescribed statutory maximum must be submitted to

a jury, and proved beyond a reasonable doubt") (emphasis added); *id.* at 482-83 (jury must determine any fact that "exposes the criminal defendant to *a penalty*" that exceeds the maximum he would otherwise receive) (emphasis added); *id.* at 494 ("the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a *greater punishment* than that authorized by the jury's guilty verdict") (emphasis added).

This Court's restatement of the *Apprendi* principle in subsequent cases confirms that it applies to all forms of criminal punishment, without qualification. See, *e.g.*, *Ring* v. *Arizona*, 536 U.S. 584, 602 (2002) ("If a State makes an increase in a defendant's authorized *punishment* contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt") (emphasis added); *Blakely*, 542 U.S. at 304 (a judge exceeds his authority when he "inflicts *punishment* that the jury's verdict alone does not allow") (emphasis added); *Booker*, 543 U.S. at 232 (the jury must "find the existence of any particular fact that the law makes essential to [a defendant's] *punishment*") (internal quotation marks omitted; emphasis added). As the court of appeals acknowledged, this Court's decisions applying and construing *Apprendi* "do not distinguish among types of 'penalties' or 'punishment,' leaving the broad language unglossed." Pet. App. 27a.

The plain language of *Apprendi* and its progeny therefore establishes that the *Apprendi* principle applies to the imposition of criminal fines. There can be no dispute that a fine imposed upon an individual or organization convicted of a crime is a form of criminal "punishment" or "penalty." See *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492

U.S. 257, 265 (1989) ("at the time of the drafting and ratification of the [Eighth] Amendment, the word 'fine' was understood to mean a payment to a sovereign as *punishment* for some offense") (emphasis added). Indeed, this Court recognized in *Apprendi* that fines are one of the oldest forms of criminal punishment. 530 U.S. at 480 n.7. Moreover, in other Sixth Amendment contexts, this Court has expressly stated that "[i]n using the word 'penalty,' [the Court does] not refer solely to the maximum prison term authorized for a particular offense," but also to "other penalties" such as "probation or a fine." *Blanton* v. *City of N. Las Vegas*, 489 U.S. 538, 542 (1989) (addressing whether a crime carried sufficient penalties to be subject to the jury trial guarantee). Accordingly, the *Apprendi* principle, by its express terms, applies to the imposition of criminal fines.

4. This Court's Application Of The *Apprendi* Principle Confirms That It Applies To Fines.

This Court's application of the *Apprendi* principle in subsequent cases further confirms that it applies to forms of criminal punishment other than incarceration. *Ring*, of course, held that *Apprendi*'s holding applies to the imposition of the death penalty. *Ring*, 536 U.S. at 589 ("Capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment").

In *Booker*, 543 U.S. 220 (2005), this Court extended its holdings in *Apprendi* and *Blakeley* to a context that indisputably involves criminal fines: the Federal Sentencing Guidelines. *Id.* at 226-27 ("We hold that . . . the Sixth Amendment as construed in *Blakeley* does apply to the Sentencing Guidelines").

Specifically, this Court held that the imposition of an enhanced sentence under the Guidelines based on the sentencing judge's determination of a fact (other than the fact of a prior conviction) that was not found by the jury or admitted by the defendant violates the Sixth Amendment. *Id.* at 230-44 (opinion of the Court by Justice Stevens). In order to remedy this problem and allow the Guidelines to continue to operate in a manner consistent with Congressional intent, the Court then invalidated provisions of the Sentencing Reform Act that have the effect of making the Guidelines mandatory. *Id.* at 244-71 (opinion of the Court by Justice Breyer).

This holding and remedy confirm that *Apprendi*, *Booker* and their progeny apply to the imposition of criminal fines because the Federal Sentencing Guidelines address the imposition of criminal fines. See U.S. Sentencing Comm'n, *Federal Sentencing Guidelines Manual*, §5E1.2.(a) – Fines for Individual Defendants (2010) (providing that "[t]he court shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine" and establishing a range of minimum and maximum fines for various offense levels); *id.* §8C1.1-8C4.11 (numerous provisions that address fines for organizational defendants). The Court's holding in *Booker* applies to the Guidelines *in toto* – not merely to the portions that address sentences of incarceration. In addition, the remedy that the Court imposed – rendering the Guidelines advisory rather than mandatory – applies to the Guidelines across the board, *i.e.*, to the Guideline provisions that address fines as well as to those that address incarceration. In short, *Booker* applied the *Apprendi* principle to sentencing guidelines that address criminal fines. Accordingly, this

Court has already applied the principles established in *Apprendi* to the imposition of criminal fines.

5. Judicial Consensus Prior To The Decision Below, And The United States' Previous Position, Confirm That The *Apprendi* Principle Applies To Criminal Fines.

Given the unqualified language of *Apprendi* and its progeny, and this Court's reliance in *Apprendi* on historical evidence involving the imposition of fines, it is not surprising that until the decision below, federal courts of appeals, federal district courts, state supreme courts, and commentators uniformly held (or assumed) that the *Apprendi* principle applies to the imposition of criminal fines. See Pet. at 12-17 & nn. 7-9; see also Cert. Reply 3-4 (discussing *United States* v. *AU Optronics Corp.*, 2011 U.S. Dist. LEXIS 77494 (N.D. Cal. July 18, 2011)), which expressly rejected the holding and reasoning of the First Circuit in this case). In particular, three federal courts of appeals have held that the *Apprendi* principle applies to the imposition of criminal fines and have vacated criminal fines as a result. See *United States* v. *Pfaff*, 619 F.3d 172, 175 (2d Cir. 2010) (per curiam) (vacating a $6 million fine imposed pursuant to 18 U.S.C. § 3571(d)[7] as plain error because the fine was "supported only by the district court's own pecuniary loss finding" and "it is the clear implication of *Apprendi* and *Blakely* that when a jury does not make a pecuniary gain or loss finding, § 3571's default statutory maximums cap the amount a

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[7] Pursuant to 18 U.S.C. § 3571(d), any person who derives a pecuniary gain from an offense, or causes a pecuniary loss, can be fined not more than the greater of twice the defendant's gross gain or twice the victim's gross loss.

district court may fine the defendant"), *cert. denied*, 131 S. Ct. 3059, 3060 (2011); *United States* v. *LaGrou Distrib. Sys., Inc.*, 466 F.3d 585, 594 (7th Cir. 2006) (vacating a $1 million fine imposed pursuant to § 3571(d) because "at sentencing, it was the district judge using a preponderance of the evidence standard to find the loss amount, not a jury finding loss amount beyond a reasonable doubt"); *United States* v. *Yang*, 144 F. App'x 521, 524 (6th Cir. 2005) (vacating and remanding a $5 million fine as plain error under *Booker* because it was "based on judge-found facts under a mandatory guidelines system").

Indeed, as far as petitioner has been able to determine, before this case the United States itself took the position that the *Apprendi* principle applies to the imposition of criminal fines. Notably, the United States confessed error in *LaGrou*. See Br. and App. of the United States at 33-34, *United States* v. *LaGrou*, No. 05-3361 (7th Cir. Dec. 20, 2005) ("*LaGrou* Br.") ("conced[ing] that the [*Apprendi*] rule does apply to criminal fines because they are penalties for criminal offenses" and that the fine imposed in that case had to be vacated and remanded for resentencing); *id.* at 33 ("*Apprendi* does apply to monetary fines, that is, any fact increasing the maximum fine above the prescribed statutory maximum must be proven beyond a reasonable doubt").[8]

Moreover, in *Pfaff*, the United States did not argue that the *Apprendi* principle is inapplicable to criminal fines. Instead, the United States (unsuccessfully) argued that there was no *Apprendi*

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[8] The United States expressly noted in its brief that "[t]his concession was made in consultation with the Office of the Solicitor General." *LaGrou* Br. at 33 n.12.

violation in that case because the fine did not exceed the statutory maximum. Br. for the United States at 205-08, *United States* v. *Pfaff*, No. 09-1702 (2d Cir. Jan. 15, 2010). The United States' brief in *Pfaff* was filed one year after this Court issued its decision in *Ice*, and also after the government argued in its district court brief in this case that the *Apprendi* principle does not apply to fines. See Opp. 10 (conceding that the United States "did not raise [the *Ice*] argument or cite *Ice*" in *Pfaff*). In addition, the United States did not seek *certiorari* in *Pfaff* on the sentencing issue. See also Brief for the Chamber of Commerce of the United States of America and the National Association of Criminal Defense Lawyers as *Amici Curiae* in Support of Petitioner at 10 ("Chamber/NACDL Br.") (noting that the Antitrust Division of the Department of Justice conceded until recently that *Apprendi* and *Booker* apply to the imposition of criminal fines).

The near consensus among federal and state courts that fines are subject to the *Apprendi* principle, and the United States' apparent concurrence in this view for nearly a decade after *Apprendi* was decided, confirm that this is the clear import of the language and reasoning of *Apprendi* and its progeny.

B. The Fine Imposed By The District Court Violated The Constitution.

The fine provision in the statute that was the basis for Southern Union's conviction, 42 U.S.C. § 6928(d), applies on a per-day basis at a maximum of $50,000 for each day the statute was violated. See *id.* (specifying "a fine of not more than $50,000 for each day of violation"). As shown, the district court violated *Apprendi* by making a factual determination that increased the available sentence beyond the single-day fine supported by the jury's verdict. More-

over, the district court made an even more fundamental Fifth and Sixth Amendment error by effectively determining that Southern Union was *guilty* of violating RCRA for 761 days more than the single day supported by the jury's verdict. See *Apprendi*, 530 U.S. at 476-77 (acknowledging that a criminal defendant is indisputably entitled "to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'") (alteration in original) (quoting *United States* v. *Gaudin*, 515 U.S. 506, 510 (1995)).

At trial, the district court instructed the jury that the law required the government to prove beyond a reasonable doubt each of the following elements that comprise the crime: (1) knowingly storing a waste; (2) that is hazardous; (3) without a permit; and (4) knowing that the waste had a substantial potential to be harmful to others or to the environment. J.A. 129-30. The jury instructions did not direct the jury to determine the number of days or the duration of any violation that it found, and instead instructed the jury that in order to convict it "needed only to 'determine . . . whether at *some point* in time the liquid mercury was discarded by being abandoned' and therefore ceased to be legally held for future recycling and began to be stored as waste." Pet. App. 33a (emphasis in original); J.A. 135-36. Accordingly, the jury's general guilty verdict supports a conviction for only a single day's violation.

The district court nevertheless based the statutory maximum fine on a RCRA violation of 762 separate days. Pet. App. 46a. In making this finding, the court necessarily determined that all four elements of the crime were proven for each of the 761 days of the indictment period that were *not* covered by the jury's verdict. In other words, the district court acted as a

second jury by weighing the evidence, assessing credibility, deciding contested facts and applying the law to determine the number of days that RCRA was violated.[9] It did this, moreover, by bypassing the jury's beyond-a-reasonable-doubt standard that the Constitution requires for findings of criminal guilt, and instead applying a preponderance of the evidence standard. This is precisely the sort of judicial encroachment on the historic jury function that the Fifth and Sixth Amendments were designed to prevent. See *Sullivan* v. *Louisiana*, 508 U.S. 275, 277 (1993) (an accused's right under the Sixth Amendment is "of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty'").

The United States conceded below that "if the rule in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), extends to fines, the district court was barred from raising § 6928(d)'s fine maximum based on its own findings concerning the number of days that Southern Union violated the statute." U.S. First Cir. Br. at 36. It also conceded that "the jury was not asked to find a particular number or span of days of illegal storage" and that "[e]ach daily increment represents a higher statutory maximum." *Id.* at 36, 38. Accordingly, because (as shown) the *Apprendi* principle does apply to criminal fines and because the district court imposed a fine greater than § 6928(d)'s fine maximum based on its own – rather than the jury's – findings concerning the number of days of

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[9] In this regard, the district court's factual finding that RCRA was violated for 762 days might well conflict with the jury's views. *See United States* v. *O'Brien*, 130 S. Ct. 2169, 2177 (2010) (expressing concern that a judicial finding for sentencing purposes that the defendant used a machine gun might conflict with the jury's belief that he used another weapon).

Southern Union's RCRA violation, the fine imposed by the district court violated Southern Union's Fifth and Sixth Amendment rights.[10]

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THIS COURT'S REASONING IN *OREGON* v. *ICE* SUGGESTS THAT THE *APPRENDI* PRINCIPLE DOES NOT APPLY TO THE IMPOSITION OF CRIMINAL FINES.

The court of appeals held that the plainly-stated *Apprendi* principle does not apply to the imposition of criminal fines based on its view that *Oregon* v. *Ice*, 555 U.S. 160 (2009), "has effected a change in the application of the *Apprendi* rule to the issue in this

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[10] Even though the court of appeals stated three times in its opinion that any *Apprendi* error in this case could not have been harmless, see Pet. App. 2a, 32a-33a, 34a, the United States nevertheless asserted in its brief in opposition that the *Apprendi* error somehow was harmless. Opp. 16. It is not clear whether the United States will press this "harmless error" argument on the merits, but any such argument would be unavailing because, as petitioner demonstrated in its reply brief, the court of appeals' finding that the *Apprendi* violation was not harmless is fully supported by the record. Cert. Reply 6-8. In addition, the United States is foreclosed from asserting (*see* Opp. 16-18) that the First Circuit applied an incorrect legal standard when assessing harmless error because the standard that the First Circuit applied was the one that the United States itself proposed. Cert. Reply 5-6. In all events, this Court should not reach any harmless error claim asserted by the United States. Although this Court has the authority to make a harmless error determination, it "do[es] not ordinarily do so." *Carella* v. *California*, 491 U.S. 263, 266-67 (1989) (per curiam); *see also Ring*, 536 U.S. at 609 n.7 (declining to reach Arizona's assertion of harmless error and remanding the case). It would be particularly appropriate here for this Court not to rule on any harmless error claim because the United States' claim is case-specific and record-intensive.

case." Pet. App. 31a. *Ice*, however, did not involve the imposition of a criminal fine, and the court of appeals' view that it "alter[ed] any previous broad understanding of *Apprendi*," *id.* at 28a, is fundamentally flawed and ignores *Ice*'s exceedingly narrow ruling.

A. The *Ice* Decision.

In *Ice*, this Court addressed the following question: "When a defendant has been tried and convicted of multiple offenses, each involving discrete sentencing prescriptions, does the Sixth Amendment mandate jury determination of any fact declared necessary to the imposition of consecutive, in lieu of concurrent, sentences?" 555 U.S. at 163. Consistent with this formulation of the question presented, which limited the Court's inquiry in *Ice* to defendants "tried and convicted of multiple offenses," the Court repeatedly emphasized that the multiple offense context was critical to its analysis, and also presented a question of first impression. See, *e.g.*, *id.* ("[t]hus far, the Court has not extended the *Apprendi* and *Blakely* line of decisions beyond the offense-specific context that supplied the historic grounding for the decisions"); *id.* at 167 (observing that *Apprendi* and its progeny all "involved sentencing for a discrete crime, not – as here – for multiple offenses different in character or committed at different times").

This Court held that the *Apprendi* principle does not "extend[]" to the "imposition of sentences for discrete crimes" based on its conclusion that "[t]he decision to impose sentences consecutively is not within the jury function that 'extends down centuries into the common law.'" *Id.* at 168 (quoting *Apprendi*, 530 U.S. at 477). "In light of this history," the Court explained, "legislative reforms regarding the imposition of multiple sentences do not implicate the core

concerns that prompted [the Court's] decision in *Apprendi*." *Id.* at 169; see also *id.* at 168 (*Apprendi*'s "animating principle is the preservation of the jury's historic role as a bulwark between the State and the accused at the trial for *an alleged offense*") (emphasis added); *id.* at 170 (noting that *Apprendi*'s core concerns are legislative attempts to "'remove from the [province of the] jury' the determination of facts that warrant punishment for *a specific statutory offense*") (emphasis added; alteration in original) (quoting *Apprendi*, 530 U.S. at 490).

This Court's holding in *Ice* was thus narrowly tailored to a multiple offense context that was presented in that case and is not presented here. *Ice* is properly understood as a decision that declined to extend *Apprendi* to the multiple offense context; not a decision that either narrowed the *Apprendi* principle as it applies in the single offense context or adopted a new methodology for resolving *Apprendi* issues.

B. The Court Of Appeals Erred By Relying On Dictum In *Ice* Concerning Fines.

This Court in passing observed in *Ice*:

> Trial judges often find facts about the nature of the offense or the character of the defendant in determining, for example, the length of supervised release following service of a prison sentence; required attendance at drug rehabilitation programs or terms of community service; and *the imposition of statutorily prescribed fines* and orders of restitution. See Brief for State of Indiana et al. as *Amici Curiae* 11. Intruding *Apprendi*'s rule into these decisions on sentencing choices or accoutrements surely would cut the rule loose from its moorings.

Id. at 171-72 (emphasis added).

Citing this single, oblique reference to fines in *Ice*, the court of appeals held that the *Apprendi* principle does not apply to the imposition of fines. See Pet. App. 28a-29a. This reliance was misguided. As an initial matter, as noted, *Ice* did not involve any issue concerning a criminal fine. See Opp. 13 (acknowledging that *Ice* "involved consecutive sentencing, not fines"). Accordingly, under this Court's long-standing precedent, the off-hand statement in *Ice* concerning fines cannot be controlling here because this Court is "'not bound to follow [its] dicta in a prior case in which the point now at issue was not fully debated.'" *Parents Involved in Cmty. Sch.*, 551 U.S. at 737 (plurality opinion) (quoting *Cent. Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363 (2006)); see also *Permian Basin Area Rate Cases*, 390 U.S. 747, 775 (1968) ("this Court does not decide important questions of law by cursory dicta inserted in unrelated cases"). The question whether the *Apprendi* principle applies to fines was not presented or briefed in *Ice* – much less "fully debated" – and therefore, the *Ice* dictum is entitled to no weight.

Even if the "cursory dict[um]" in *Ice* is considered, it has no persuasive force. The Court's meaning in the passage at issue is far from clear. As a result, the dictum does not remotely permit a court to use non-jury fact-finding to impose a fine that exceeds the maximum fine set by the legislature, which is what occurred in this case. In this regard, the district court correctly observed that "[t]he best that can be said about" the *Ice* dictum is that this Court was saying that *Apprendi* should not be construed to "prevent a Court from engaging in judicial fact finding to determine the amount of a penalty *within* the prescribed statutory maximum range, which is something entirely different from finding a fact that

determines the range." Pet. App. 45a (emphasis in original). This reading is supported by the Court's reference to judicial fact-finding "about the nature of the offense or the character of the defendant" – classic inquiries (*e.g.*, about the particular defendant's ability to pay) that sentencing courts undertake to assess the amount of a fine *within a prescribed range*. *Ice* does not suggest that this Court was addressing the fundamentally different type of judicial fact-finding that occurred here: judicial fact-finding to determine whether a crime was committed on any of the days charged in the indictment, and if so, on which days.

It is also possible that the Court was addressing yet another type of judicial fact-finding that is not at issue in this case: judicial fact-finding that occurs in the context of determining whether to impose a fine or fee *in addition to* a term of incarceration. In the relevant passage in *Ice*, this Court cited an amicus brief filed by a group of States as raising the concerns it identified. This amicus brief addressed fines and other "aspects" of a sentence in the situation where they are "imposed *in addition to* an executed term in prison." See Brief of Indiana, et al. as *Amici Curiae* in Support of Petitioner at 12, *Oregon* v. *Ice*, No. 07-901 (emphasis added); see also *id.* (discussing convicted persons who are "*both* incarcerated and ordered to pay a fine" as an "additional" punishment) (emphasis added). Whatever concerns the Court may have suggested about applying *Apprendi* to fines in that circumstance, *Ice* did not present that issue and neither does this case, where the fine was imposed pursuant to a maximum daily fine provision in a statute and was the primary form of punishment.

In this regard, in explaining why it was "unconvinced" by the First Circuit's interpretation of

the *Ice* dictum, the district court in *AU Optronics* noted that this Court's apparent concerns in *Ice* about extending the *Apprendi* principle to "accoutrements" of criminal sentencing, 555 U.S. at 171-72, are a remarkably "poor fit" when applied to multi-million dollar fines that are "the primary form of punishment the government seeks," rather than "an ancillary form of punishment." 2011 U.S. Dist. LEXIS 77494, at *12; see also *id.* ("The magnitude and primacy of such punishment puts it in a separate class from an ordinary criminal fine imposed against a defendant who faces incarceration."). When substantial monetary penalties are at stake and judicial fact-finding would increase the statutory maximum fine, the core Fifth and Sixth Amendment principles that underlie the *Apprendi* rule are squarely implicated. Accordingly, application of that rule would hardly "cut the rule loose from its moorings." *Ice*, 555 U.S. at 171-72. To the contrary, creating an exception to *Apprendi* for all criminal fines would eviscerate constitutional protections that this Court has long recognized apply in the sentencing context.

In sum, whatever this Court meant in *Ice* by its fleeting reference to fines, this dictum cannot remotely qualify as controlling authority on the question presented in this case, and is better understood as not at all directed at this case.

C. The Court Of Appeals' Historical Analysis Based on *Ice* Is Fundamentally Flawed.

The court of appeals was also mistaken in its view that this Court's reliance in *Ice* on historical sentencing practices was a new "logic and method" that "alter[ed] any previous broad understanding of *Apprendi*." Pet. App. 28a. *Ice*'s analysis of historical sentencing practices was hardly a "new" metho-

dology. As shown in Section I, the *Apprendi* principle is derived from common law and historical sentencing practices, and the Court's opinion extensively canvassed those practices with respect to fines as well as other forms of punishment. Indeed, this Court expressly acknowledged in *Ice* that the *Apprendi* principle is "rooted in the historic jury function – determining whether the prosecution has proved each element of an offense beyond a reasonable doubt." 555 U.S. at 163; see also *id.* at 167-68 (noting that the *Apprendi* principle is "rooted" in "'longstanding common-law practice'") (quoting *Cunningham* v. *California*, 549 U.S. 270, 281 (2007)); *Harris* v. *United States*, 536 U.S. 545, 557 (2002) (plurality opinion) ("*Apprendi* said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime – and thus the domain of the jury – *by those who framed the Bill of Rights*") (emphasis added).

Further, the First Circuit's attempt at historical analysis is itself fundamentally flawed. The court of appeals rested its holding on its belief that "historically, judges assessed fines without input from the jury." Pet. App. 30a. According to the panel, "[j]udges had discretion to determine the amount of any fine imposed, and '[t]he range was apparently without limit except insofar as it was within the expectation on the part of the court that it would be paid.'" *Id.* (quoting Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 Am. J. Legal Hist. 326, 350 (1982)).

Although there is evidence supporting this historical conclusion – and petitioner acknowledges that the Court itself suggested this conclusion in *Apprendi* – it appears to be based on evidence of

sentencing practices for fines that were not, as here, limited by statute. Moreover, the history in fact is more complex and, with respect to colonial practice at the time of the Founding, not entirely clear. It appears to be true that English judges generally had discretion to determine the amount of any fine imposed.[11] Colonial practice is less susceptible to generalization. To begin with, conclusions about colonial history are difficult to draw because records of colonial sentencing practices are "almost non-existent." Morris B. Hoffman, *The Case for Jury Sentencing*, 52 Duke L.J. 951, 963 n.43 (2003); see also Preyer, *supra*, at 347 (noting that "incompleteness of records" with respect to colonial penal practices is "a caution which cannot be emphasized too often"); *id.* at 328 ("[A]nyone attempting a synthesis of the application of penal measures in the thirteen colonies is confronted instantly with a dearth of scholarship on this particular subject.").

Nevertheless, colonial statutes are informative and suggest variation in the discretion accorded to judges with respect to fines. Some colonial statutes prescribed fines without specifying any particular sum. See, *e.g.*, *Body of Liberties*, art. 22, *in The Colonial Laws of Massachusetts* 29, 38-39 (W. Whitmore ed. 1889) (1641) (empowering court to impose a "reasonable fine" on any resident guilty of bringing a "vexatious suit"); *The Laws and Liberties of Massachusetts* 23 (M. Farrand reprint ed. 1929)

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[11] Again, this appears to be the case because fines generally were not statutorily fixed. *See* 4 William Blackstone, *Commentaries* *371-72 ("Our statute law has not therefore often ascertained the quantity of fines, nor the common law ever; it directing such an offense to be punished by fine, in general, without specifying the certain sum"); J.H. Baker, *An Introduction to English Legal History* 584 (3d ed. 1990).

(1648) (empowering judges to fine persons guilty of fornication in an amount "most agreeable to the word of God"); *id.* at 36 (setting punishment for "openly or willingly defam[ing] any Court of [J]ustice" as "Fine, Imprisonment, Disfranchisement, or Bannishment as the qualitie and measure of the offense shall deserve") (emphasis omitted). Other colonial statutes set a maximum fine but gave judges discretion to choose a lower amount. See, *e.g.*, Preyer, *supra*, at 333 (robbery, larceny, and burglary punishable in the Massachusetts Bay colony by "fines of up to £5"); *id.* at 344 (petit larceny punishable in Pennsylvania by a "maximum of 15 lashes, 20 shilling fine, and 'if able,' restitution"). Still others prescribed an exact sum. See, *e.g.*, *id.* at 341 (penalty in Virginia for a particular crime by a servant was a "one-year extension of service or fine of 1,000 pounds of tobacco"); Lawrence Henry Gibson, *The Criminal Codes of Connecticut*, 6 J. Am. Inst. Crim. L. & Criminology 177, 181 (1915) ("[h]ouse-breaking" punishable in Connecticut by "[a] fine of ten pounds") (emphasis omitted). Accordingly, it was *not* invariably the case that colonial judges' power to impose fines was "without limit."

Moreover, the First Circuit's suggestion that *Apprendi* does not apply to criminal punishments that historically were subject to judicial discretion also ignores evidence indicating that, to the extent that incarceration was used in common law England, the prison sentences were in some circumstances discretionary. See Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 Vand. L. Rev. 1233, 1261 (1987) ("common-law crimes could result in imprisonment for an indefinite period of time," although "statutory crimes generally resulted in imprisonment for a

definite period"); see also Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 Yale L.J. 1097, 1125 & n.206 (2001) ("The sentences of imprisonment for misdemeanors were not capped at one year, as they are in modern America. In theory, judges could order unlimited imprisonment, though in practice they appear not to have imposed sentences of longer than five years."). Blackstone himself lauded the "discretionary length of imprisonment, which [English] courts are enabled to impose," because such sentences took into account "the aggravations or otherwise of the offense, the quality and condition of the parties, and . . . innumerable other circumstances." 4 Blackstone, *supra*, at *371. Accordingly, if (as the First Circuit suggests) *Apprendi* does not apply to criminal punishments that were historically subject to judicial discretion, then *Apprendi* would not apply to incarceration either – but it most certainly does.

Nor is it true that the assessment of fines was never a jury function. Statutes from both before and soon after the Founding[12] indicate that jurors in some States set fines.[13] In Virginia, for example, "[o]ne of

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[12] In *Ice*, this Court's consideration of the historical record included practices in "the early American States." 555 U.S. at 169 & n.9.

[13] Jurors' power in these States to determine fines harks back to medieval England, where monetary penalties for both civil and criminal misconduct were set by juries. Such monetary penalties were called "amercements." *See* Massey, *supra*, at 1259 ("The amercement was an all-purpose monetary sanction used to penalize both criminal and civil wrongdoing."). Significantly, as stipulated by Magna Carta, jurors, not judges, determined the amount of an amercement. *See* Magna Carta § 14 ("[A]nd none of the aforesaid amerciaments shall be assessed, but by the oath of honest and lawful men of the vicinage."); 4 Blackstone, *supra*, at *373 ("[T]he great charter also directs,

the Commonwealth's first statutes declared that the crime of maintaining the authority of Great Britain will be punished 'with fine and imprisonment, to be ascertained by a jury.'" Nancy J. King, *The Origins of Felony Jury Sentencing in the United States*, 78 Chi.-Kent L. Rev. 937, 943 n.27 (2003) (quoting Oct. 1776 Va. Laws 15). Indeed, it appears that the default rule in Virginia was that juries, not judges, set fines. See Oct. 1786 Va. Laws ch. 64 ("[I]n every . . . information or indictment, the amercement which ought to be according to the degree of the fault . . . shall be assessed by twelve honest and lawful men . . . ."); King, *supra*, at 943 ("In general, juries fixed fines in their verdicts while judges fixed other sentences, including any period of incarceration in jail . . . .") (emphasis omitted).[14]

Kentucky, too, empowered juries to set fines. See, *e.g.*, 1801 Ky. Acts ch. 84, § 28 (vote selling); *id.* § 32 (rioting); *id.* § 33 ("[g]oing with force and arms before the court"); *id.* § 37 (altering brands); see also *Commonwealth* v. *Watkins*, 6 Ky. (3 Bibb) 21, 22

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that the amercement . . . shall be set . . . or reduced to a certainty, by the oath of a jury."). Although amercements fell out of use in England during the seventeenth and eighteenth centuries, the term itself did not fall out of use, and at least two of the early American States that provided for jury-determined fines (Virginia and Kentucky) called such fines "amercements." *See* Oct. 1786 Va. Laws ch. 64; 1801 Ky. Acts ch. 84, §§ 28, 32.

[14] *See also* Oct. 1786 Va. Laws ch. 52 (officer who accepts bribe shall be "amerced and imprisoned at the discretion of a jury"); *id.* ch. 54 (any person who disturbs or arrests a minister during a service shall be imprisoned and amerced "at the discretion of a jury"); *Commonwealth* v. *Chapman*, 3 Va. (1 Va. Cas.) 138 (1803) (reporting that jury convicted and fined defendant $450 for attempted bribery); *Commonwealth* v. *Alexander*, 14 Va. (4 Hen. & M.) 522 (1808) (reporting that jury convicted and fined defendant $50 for being intoxicated while performing official duties).

(1813) ("[I]n all cases where the penalty imposed shall exceed five pounds, or shall be uncertain, the trial shall be by jury, who shall find the amount of the penalty or forfeiture incurred."); King, *supra*, at 984 ("It was the [Kentucky] county jury that selected a misdemeanant's sentence when the penalty was not mandatory, both before and after the reform act of 1798.") (emphasis omitted). Alabama did the same, as did Indiana and Mississippi. See King, *supra*, at 990 app. (noting that Alabama's 1807 code "allow[ed] juries to set fines but not imprisonment"); *Wynn* v. *State*, 1 Blackf. 28, 29 (Ind. 1818) (describing Indiana statute that authorized jury to set fine in prosecution for riot); *State* v. *Blennerhassett*, 1 Miss. (Walker) 7, 17 (1818) ("It is the duty of the jury to assess the fine according to the nature and aggravation of the offence."). In addition, cases from the mid-1800s show that juries in Missouri, Tennessee, and Texas also set fines. See *Barada* v. *State*, 13 Mo. 94 (1850) (gaming); *Gillespie* v. *State*, 25 Tenn. (6 Hum.) 164 (1845) (usury); *Holt* v. *State*, 2 Tex. 363 (1847) (affray). Accordingly, the historical record indicates that early American juries sometimes set fines.

This history distinguishes this case from *Ice*. In *Ice*, it was undisputed that the jury historically "played *no* role in the decision to impose sentences consecutively or concurrently." 555 U.S. at 168 (emphasis added); see *id.* at 169 ("Ice 'has no quarrel with [this account] of consecutive sentencing practices through the ages'") (alteration in original) (citing Br. for Resp't at 32). Here, by contrast, the historical record indicates that in the years both before and following Ratification, at least five States (including Virginia, home of several prominent Founders) empowered juries to set fines. Thus, the imposition of fines is not a sentencing practice that historically

has been performed exclusively by judges. Compare *Ice*, *id.* at 168 ("[T]he choice [whether to impose sentences consecutively or concurrently] rested exclusively with the judge.").

Moreover, even if the First Circuit had more carefully analyzed the historical record and it was invariably true that judges determined fines and had unfettered discretion to do so, the court of appeals' conclusion that fines are outside the scope of the *Apprendi* principle does not follow. The court of appeals asserted that the unfettered judicial discretion with respect to fines that it posited was "in direct contrast with the Supreme Court's reasoning in the *Apprendi* context" that common law judges had little sentencing discretion. Pet. App. 30a. But this is flatly wrong. As shown, this Court's reasoning in *Apprendi* was in part based on its own historical conclusion that judges had discretion with respect to fines. Indeed, the Court *relied on this sentencing practice in deriving the* Apprendi *principle.* As shown, this Court in *Apprendi* canvassed and examined a variety of historical sentencing practices in reaching its conclusion that judges cannot make factual determinations that elevate the available sentence above that supported by the jury's verdict. The Court relied on the fact that common law judges had little sentencing discretion with respect to felonies because criminal statutes at that time generally set fixed sanctions (which meant that judges did not impose penalties that exceeded the maximum authorized by the jury's verdict). 530 U.S. at 479. But it *also* relied on its conclusion that common law judges generally had wide discretion in imposing fines and other punishments for misdemeanors without statutory limits (which also meant that judges did not impose penalties that exceeded

the maximum authorized by the jury's verdict). See *id.* at 480 n.7; see also *Jones*, 526 U.S. at 244.

Accordingly, the First Circuit's conclusion that criminal fines are outside of *Apprendi*'s scope is fundamentally flawed because it is based on the very historical conclusion concerning fines that this Court relied on to demonstrate that the *Apprendi* principle is rooted in and confirmed by historical sentencing practices. No amount of mental gymnastics can support the First Circuit's view that fines have a separate common law history from incarceration for *Apprendi* purposes, when the *Apprendi* rule was derived from historical sentencing practices concerning a wide variety of criminal punishments, including fines.

III. THE COURT OF APPEALS' HOLDING THAT DEFENDANTS SUBJECT TO CRIMINAL FINES DO NOT MERIT THE SAME CONSTITUTIONAL PROTECTIONS AS DEFENDANTS SUBJECT TO INCARCERATION AND OTHER CRIMINAL PENALTIES IS UNSOUND AND CREATES ANOMALIES.

The foregoing discussion demonstrates that neither this Court's decisions in the *Apprendi* line of cases, nor the historical practices from which the *Apprendi* principle is derived, support the First Circuit's holding that criminal fines – alone among criminal punishments – are not eligible for *Apprendi*'s protections. This section provides additional support for the conclusion that criminal fines should stand on the same constitutional footing as other forms of criminal punishment for *Apprendi* purposes.

A. Criminal Defendants Subject To Fines Should Be Included In *Apprendi*'s Protections.

The First Circuit's exclusion of fines from *Apprendi*'s protections is inconsistent with this Court's holdings that criminal defendants who are subject to criminal fines are entitled to other constitutional protections. These protections confirm that criminal fines are a significant form of punishment that can only be imposed when fundamental constitutional safeguards are observed.

The Constitution itself protects criminal defendants from government abuse of power with respect to the imposition of fines by prohibiting fines that are "excessive." U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). As this Court has explained, the purpose of the Excessive Fines Clause is "to limit the government's power to punish," specifically, the power "to extract payments, whether in cash or in kind, 'as *punishment* for some offense.'" *Austin* v. *United States*, 509 U.S. 602, 609-10 (1993) (emphasis in original) (quoting *Browning-Ferris*, 492 U.S. at 265).[15] In this regard, the Court noted in *Browning-Ferris* that "[t]he Framers of our Bill of Rights were aware and took account of the abuses that led to the 1689 Bill of Rights" in England, which included the imposition by the King's Judges of "heavy fines on the King's enemies" during the reigns of the Stuarts. 492 U.S. at 267; see also *id.* (noting

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[15] Although this Court has held that *in rem* civil forfeitures are subject to the limitations of the Excessive Fines Clause, *Austin*, 509 U.S. 602, it has noted that its "cases long have understood [the provisions of the Eighth Amendment] to apply primarily" to "criminal prosecutions and punishments," *Browning-Ferris*, 492 U.S. at 262.

that "some opponents of the King were forced to remain in prison because they could not pay the huge monetary penalties that had been assessed").

The fact that the drafters of the Bill of Rights included a specific provision to limit government authority to impose criminal fines should dispel any notion that fines are a less significant or less important form of criminal punishment that do not merit full constitutional safeguards. To the contrary, constitutional safeguards are particularly vital with respect to fines because as this Court has observed:

> There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment, and even capital punishment cost a State money; fines are a source of revenue.

Harmelin v. *Michigan*, 501 U.S. 957, 979 n.9 (1991) (plurality opinion). For this reason, the Court continued, "it makes sense to scrutinize governmental action more closely" with respect to criminal fines because "the State stands to benefit." *Id.*; cf. *Tumey* v. *Ohio*, 273 U.S. 510, 531-35 (1927) (Fourteenth Amendment Due Process Clause violated by Ohio statutory scheme that permitted defendants charged with violating Ohio's Prohibition Act to be tried by a village mayor who received a fee for his service only if he found the defendant guilty and who was authorized to impose "large" fines that were divided between the State and the village).

Moreover, criminal defendants subject to fines are entitled to other fundamental constitutional safeguards. The rights accorded by the Sixth Amendment – including the rights to a speedy trial, confront witnesses, and obtain compulsory process – apply

"[i]n all criminal prosecutions." U.S. Const. amend. VI. In addition, the Fifth Amendment's grand jury guarantee applies to anyone charged with an "infamous crime," and its due process guarantee applies to deprivations of "property" as well as deprivations of "life" and "liberty." *Id.* amend. V. See also *Jeffers* v. *United States*, 432 U.S. 137, 155 (1977) (plurality opinion) ("Fines, of course, are treated in the same way as prison sentences for purposes of double jeopardy and multiple-punishment analysis") (citing *North Carolina* v. *Pearce*, 395 U.S. 711, 718 n.12 (1969)); *Int'l Union, United Mine Workers of Am.* v. *Bagwell*, 512 U.S. 821, 838 (1994) (the imposition of a "serious" criminal contempt fine – $52 million – "could not be imposed absent a jury trial").

In addition, the First Circuit's holding that the *Apprendi* principle does not apply to the imposition of criminal fines would especially compromise the Sixth Amendment rights of corporations, since corporations cannot be incarcerated and are principally penalized upon conviction through the imposition of criminal fines. The elimination of corporations from *Apprendi*'s protections would be inconsistent with longstanding precedent affording corporations constitutional protections in criminal proceedings. See, *e.g.*, *Hale* v. *Henkel*, 201 U.S. 43, 76 (1906) (a corporation possesses a Fourth Amendment right against unreasonable searches and seizures and "can only be proceeded against by due process of law"), *overruled in part on other grounds by Murphy* v. *Waterfront Comm'n*, 378 U.S. 52 (1964); *Fong Foo* v. *United States*, 369 U.S. 141, 143 (1962) (per curiam) (corporation entitled to protection against double jeopardy); *First Nat'l Bank of Bos.* v. *Bellotti*, 435 U.S. 765, 780 n.15 (1978) ("It has been settled for almost a century that corporations are persons within

the meaning of the Fourteenth Amendment."). Corporations are not second-class citizens under the Constitution and should not be treated as such for *Apprendi* purposes.

B. A Holding That The *Apprendi* Principle Is Inapplicable To Fines Would Have Widespread Impact And Adverse Practical Consequences.

Affirming the decision below would have far-reaching and adverse practical consequences. Fines are as significant a component of criminal sentencing today as they were historically. This is true for both individuals and corporations, but particularly for corporations because they cannot be incarcerated and are facing an era of increasing criminal enforcement of regulatory violations and vigorous enforcement of anti-corruption laws.

In 2010, 9.3% of criminal sentences in the federal courts involved fines. U.S. Sentencing Comm'n, *2010 Annual Report* 32 (chart), *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/ar10toc.htm. For corporations and other organizational defendants, 77% of criminal sentences in the federal courts involved fines. *Id.* at 38. The average fine imposed on an organizational defendant in 2010 was more than $16.3 million, and the largest fine was $1.195 billion (on a pharmaceutical corporation for violations of food and drug laws). *Id.* In total, federal courts imposed fines on more than 7700 offenders in 2010. U.S. Sentencing Comm'n, *2010 Sourcebook of Federal Sentencing Statistics*, tbl.15, *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Table15.pdf. See also Chamber/NACDL Br. at 2 (fines are "a significant component of the penalties faced by individuals," particularly in white-

collar prosecutions, and a "central component of the penalties faced by organizations," which cannot be incarcerated); *AU Optronics Corp.*, 2011 U.S. Dist. LEXIS 77494, at *12 (noting that the fine that the United States seeks "could amount to as much as $1 billion").

Affirming the First Circuit would affect criminal sentencing, for both individuals and corporations, in wide-ranging contexts. As the United States conceded below, there are numerous sentencing provisions in the United States Code and in state codes that can give rise to *Apprendi* issues because they contain maximum fine-per-day provisions. See U.S. First Cir. Br. at 43 (citing numerous federal statutes). Some of these federal criminal penalty provisions include 12 U.S.C. § 1847(a) (banking); 15 U.S.C. § 2615(b) (toxic substances control); 30 U.S.C. § 1463(b) (mineral mining); 33 U.S.C. § 1319(c)(1) & (2) (water pollution); and 42 U.S.C. § 6992d(b) (solid waste disposal). The United States also identified multiple statutes from more than 40 States that contain similar maximum-fine-per-day provisions. U.S. First Cir. Br. at 43-46.

In addition, *Apprendi* issues can arise in connection with penalty provisions that assess fines based on monetary gain to the wrongdoer or loss to the victims. For example, 18 U.S.C. § 3571, the federal criminal code's general fine provision, establishes maximum fines for individuals and organizations convicted of felonies and misdemeanors (where the law setting forth the offense does not specify an amount), but the alternative fine provision in § 3571(d) specifies that where the defendant "derives pecuniary gain from the offense" or "the offense results in pecuniary loss" to the victim, "the defendant may be fined not more than the greater of twice the gross gain or twice the

gross loss." It was § 3571(d) that gave rise to the *Apprendi* issues in both *Pfaff* and *LaGrou*. Similarly, the statute that prohibits fraud against the United States provides for a maximum fine of $1,000,000 for an offense, *id.* § 1031(a), but also provides that the fine may exceed this maximum if "the gross loss to the Government or the gross gain to a defendant is $500,000 or greater." *Id.* § 1031(b)(1). In addition, the penalty provision in the Racketeer Influenced and Corrupt Organizations Act ("RICO") provides that "a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds." See *id.* § 1963(a).

Elimination of Fifth and Sixth Amendment constitutional guarantees for these numerous fine provisions would leave significant, even "bet the company," factual findings to judicial discretion cabined only by a preponderance of the evidence standard. Defense counsel would be left without even the most basic leverage of insisting to the prosecutor that he or she must prove a particular fact or point to the jury. Thus, *amici* Chambers/NACDL observed that "exempting criminal fines from Sixth Amend-ment scrutiny will undermine the efficacy of the justice system by making innocent defendants more likely to plead guilty." Chambers/NACDL Br. at 5. This is because "prosecutors regularly use criminal fines as bargaining chips in white-collar plea negotiations," threatening that the government will seek a large fine in the event of a conviction, but promising a smaller fine if the defendant will plead guilty. *Id.* at 12. This "perverse incentive" is "stronger still for organizational defendants" because fines are their principal form of criminal punishment (since they cannot be incarcerated) and fines can have significant

adverse consequences to their shareholders and employees. *Id.* at 13-14.

In addition, eliminating fines from the scope of *Apprendi*'s protections would have thorny implications for the application of the Federal Sentencing Guidelines. As noted, this Court in *Booker* made all of the Guidelines (both Guidelines for incarceration and for fines) advisory based on its conclusion that mandatory guidelines violate the *Apprendi* principle. If the *Apprendi* principle is not applicable to fines, however, then there was no reason to invalidate the provision of the Sentencing Reform Act that has the effect of making the Guidelines mandatory as they apply to fines, and Congress would be free to re-adopt this aspect of the Act. This would result in a bifurcated regime in which federal courts might have to apply both mandatory and advisory Guidelines to the same defendant – a regime that would be difficult for judges to apply and certain to create anomalies such as high mandatory fines even for those defendants who receive downward variances as to periods of incarceration or probation.

* * * *

At the end of the day, this Court said what it meant and meant what it said in *Apprendi*, namely, any fact that increases the "penalty" for a crime, whether incarceration, fine or other punishment, must be submitted to the jury and must be proved beyond a reasonable doubt. Nothing in any subsequent decision of this Court applying the *Apprendi* principle has departed from that fundamental rule. Certainly, the Court's holding in *Ice* does not justify a wholesale departure that would strip criminal defendants of their fundamental Fifth and Sixth Amendment jury trial rights in cases involving fines. In this case the findings of the jury can support only a $50,000 fine

and anything beyond that amount violates the Constitution.

CONCLUSION

The judgment of the court of appeals should be reversed, the sentence vacated, and the case remanded for resentencing.

Respectfully submitted,

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RESPONDENT'S BRIEF

No. 11-94

In the Supreme Court of the United States

SOUTHERN UNION COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Petitioner was convicted of a felony for knowingly storing hazardous waste without a permit under a statute that authorizes "a fine of not more than $50,000 for each day of violation." 42 U.S.C. 6928(d). The question presented is whether the Constitution, as interpreted in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), required that the jury rather than the trial court determine the number of "day[s] of violation" before the court could impose a fine greater than $50,000 under Section 6928(d).

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In the Supreme Court of the United States

No. 11-94

SOUTHERN UNION COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 630 F.3d 17. The preliminary sentencing memorandum of the district court (Pet. App. 39a-48a) is reported at 2009 WL 2032097. A subsequent opinion of the district court denying petitioner's motion for a judgment of acquittal or for a new trial is reported at 643 F. Supp. 2d 201.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 2010. A petition for rehearing was denied on February 17, 2011 (Pet. App. 49a-50a). On April 12, 2010, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including June 17, 2010. On June 9, 2010, Justice Breyer further

extended the time to and including July 17, 2010, and the petition was filed on July 15, 2011, and was granted on November 28, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-5a.

STATEMENT

Following a jury trial in the District of Rhode Island, petitioner was convicted of knowingly storing a hazardous waste (mercury) without a permit, in violation of 42 U.S.C. 6928(d)(2)(A). As part of the sentence, the district court imposed a fine of $6 million. The court of appeals affirmed. Pet. App. 1a-38a.

1. Following numerous instances where companies discharged hazardous industrial wastes directly into the environment, H.R. Rep. No. 1491, 94th Cong., 2d Sess. 3, 16-23 (1976) (*House Report*), Congress enacted the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*, to address the serious problems posed by the mismanagement of hazardous wastes. See 42 U.S.C. 6901 (congressional findings).

As relevant here, Congress made it a felony to knowingly store or dispose of a hazardous waste without a permit. 42 U.S.C. 6928(d)(2)(A); see also *House Report* 30 (explaining that criminal penalties are appropriate in the case of knowing violations that pose serious threats to human health). "[U]pon conviction," the defendant is liable to be punished by "a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed * * * five years." 42 U.S.C. 6928(d).

RCRA defines "hazardous waste" as any "solid waste" that threatens substantial danger to human life or health or to the environment. 42 U.S.C. 6903(5). "[S]olid waste," in turn, includes any "discarded material." 42 U.S.C. 6903(27). A material is considered discarded if it is stored or accumulated before, or in lieu of, disposal. 40 C.F.R. 261.2(b)(3). Discarded material also includes "spent materials"—used materials that have become contaminated and require further processing before reuse—even if they are intended to be reclaimed. See 40 C.F.R. 261.1(c)(1), .2(a)(2)(i)(B) and (c) & Tbl. 1; see also 40 C.F.R. 261.1(c)(4) and (7) (reclamation is a specific type of recycling where a hazardous material is processed to recover a usable product). In sum, hazardous waste (including discarded and spent materials) generally requires a storage permit under RCRA.

Mercury is a highly toxic liquid metal that can poison and kill those exposed to it. Pet. App. 2a; see C.A. App. 645-646, 1186-1187, 1855. When mercury is discarded or intended to be discarded, it is a hazardous waste under RCRA. See 40 C.F.R. 261.33(f) Tbl.

2. Petitioner is a large, publicly traded company engaged in the transportation and distribution of natural gas throughout the nation. It is headquartered in Texas and operated a division serving customers in, among other places, Rhode Island. See J.A. 98, 146-147; C.A. App. 2749-2751.

In June 2001, petitioner began removing outdated mercury-containing gas regulators from customers' homes in Rhode Island and Massachusetts and replacing them with mercury-free regulators. Pet. App. 3a. Petitioner at first hired an environmental firm to remove the mercury from the regulators and ship it to a recycling

facility. *Id.* at 3a-4a. But petitioner discontinued that arrangement after five months. *Ibid.*

For the next two and one-half years, petitioner continued to collect malfunctioning mercury-filled regulators and any loose liquid mercury that its employees found, without any plan to reclaim the mercury or store it safely. Pet. App. 4a. Petitioner had "no intended use [for] the mercury" it accumulated. C.A. App. 903, 966, 1519. Company employees were instructed that whenever they found mercury, they were to "get rid of it." *Id.* at 1047.

Company officials decided to bring the mercury-filled regulators and "loose" liquid mercury to a brick building on a property petitioner owned in Pawtucket, Rhode Island. Pet. App. 3a-4a. The property "was not well maintained and had fallen into disrepair": the "perimeter fence was rusted," with several unrepaired gaps, and "[t]here were no security cameras." *Id.* at 3a. The building where the mercury was stored likewise "was in poor condition"; it had "many broken windows" and its walls "were covered in graffiti." *Id.* at 4a. The building had been used for "[s]torage of junk"; it contained broken tools and furniture, discarded equipment, and empty cans and drums. C.A. App. 569; see *id.* at 445-450, 574-575, 1520; see also *id.* at 2805-2807, 2812, 2827 (photos).

Petitioner stored the mercury-filled regulators in plastic kiddie pools on the floor of the building and the liquid mercury "in various containers in which it arrived, including a milk jug, a paint can, glass jars, and plastic containers." Pet. App. 4a. By July 2004, the brick building held 165 regulators and 1.25 gallons (more than 140 pounds) of liquid mercury. *Ibid.* Petitioner's environmental services manager repeatedly asked the company

to dispose of the "*waste*" in 2002, 2003, and 2004, but the company took no action. *Id.* at 4a-5a. Even though petitioner "was well aware that the mercury was piling up and that it was kept in unsafe conditions," it did not "arrange for recycling," "secure the building," or "secure a storage permit," and it had "removed the single part-time security guard from the site." *Id.* at 3a-4a. Petitioner also did not post any signs inside or outside the building warning that it contained hazardous substances—even though petitioner "was aware that homeless people were staying * * * on the property" and that the property was "frequently vandalized." *Ibid.*

In September 2004, local youths broke into the brick building, found the liquid mercury, and spilled it in and around the building. Pet. App. 5a-6a. They also took some of the mercury back to their apartment complex, "where they spilled more on the ground, dipped cigarettes in it, and tossed some in the air." *Id.* at 6a; see C.A. App. 855-862. Other residents of the complex inadvertently tracked the mercury into their residences. Pet. App. 6a. Petitioner did not discover the release until weeks later, when an employee "found pancake-sized puddles of mercury around the brick building." *Ibid.* Rather than immediately contact state or local fire department officials (the designated points of contact for a mercury spill), petitioner immediately began shipping the mercury offsite. *Ibid.* Petitioner eventually did contact the authorities, and all five buildings in the apartment complex had to be evacuated. *Ibid.* The residents were displaced for two months during cleanup and had to undergo testing for mercury poisoning. *Ibid.*

3. A grand jury in the District of Rhode Island returned an indictment charging petitioner with knowingly storing mercury without a permit, in violation of

42 U.S.C. 6982(d)(2)(A), "[f]rom on or about September 19, 2002 until on or about October 19, 2004," a period of 762 days. J.A. 104-105. At trial, petitioner did not contest that it stored the mercury without a permit for the entire period alleged in the indictment. C.A. App. 410-429, 1045-1047, 1102-1104, 1226-1230, 1292-1295, 1520, 2589-2633; J.A. 142-144; see also Pet. App. 41a-42a. Instead, it contended that it intended to reclaim the mercury, and so a permit was not required. Pet. App. 7a.

In instructing the jury, the district court stated that the government "need not establish with certainty the exact date of the alleged offense," but rather that "the offense was committed on a date reasonably near the date alleged." J.A. 128.[1] The jury returned a guilty verdict, which read:

> As to Count 1 of the indictment, on or about September 19, 2002 to October 19, 2004, knowingly storing a hazardous waste, liquid mercury, without a permit, we the jury find the Defendant, Southern Union Company GUILTY.

J.A. 141.

The presentence investigation report (PSR) concluded that the maximum fine available was $38.1 million, or $50,000 per day multiplied by 762 days of illegal storage. Pet. App. 39a; PSR ¶ 25; see 42 U.S.C. 6928(d). Petitioner objected to the PSR based on *Apprendi* v.

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[1] Petitioner cites (Br. 5, 8, 30) a different jury instruction that it says allowed the jury to convict if petitioner stored the mercury illegally "at *some point* in time." The cited instruction did not address the alleged dates of the violation; rather, it was part of the court's explanation about how to determine whether petitioner intended to reclaim the mercury "in the future," or instead "at some point in time" had abandoned it. J.A. 135-136.

New Jersey, 530 U.S. 466 (2000). Pet. App. 40a. In *Apprendi*, this Court held that a sentence of imprisonment had been imposed in violation of the Constitution because the court, not the jury, had made the factual finding that was necessary to impose a prison term above the statutory maximum that would apply without the factual finding. 530 U.S. at 490. Petitioner argued that *Apprendi* should be extended to criminal fines and that, because the jury did not find the specific dates of violation, the maximum fine was $50,000—the maximum for one day of violation. Pet. App. 40a; C.A. App. 3729.

The district court agreed that the Constitution, as interpreted in *Apprendi*, requires the jury to find any fact necessary to increase the statutory maximum fine. Pet. App. 44a-45a. The court concluded, however, that the jury had found that petitioner violated RCRA for the full period alleged in the indictment. *Id.* at 46a-47a. The court relied on the indictment, the jury instructions, the verdict form, and the "clear and essentially irrefutable evidence" at trial about the length of the violation. *Id.* at 47a. The district court concluded it could impose a fine up to $38.1 million. *Id.* at 48a; C.A. App. 3734 (adopting PSR).

The district court imposed a $6 million fine. J.A. 154, 163. Separately, as a special condition of probation, the court required petitioner to perform "community service" by paying a total of $1 million to various community organizations and $11 million to endow a fund for issuing environmental grants. J.A. 154-155, 162-163.

4. The court of appeals affirmed. Pet. App. 1a-38a. As relevant here, the court held that *Apprendi* permits a trial court, rather than the jury, to make factual findings necessary to impose a criminal fine. The court re-

lied on the "reasoning and logic" of *Oregon* v. *Ice*, 555 U.S. 160 (2009). Pet. App. 30a.

In *Ice*, this Court held that *Apprendi* does not extend to factual findings by trial courts that increase the length of a defendant's incarceration by permitting consecutive, rather than concurrent, sentences. 555 U.S. at 168, 172. *Ice* relied on the historical record showing that the consecutive-versus-concurrent sentence determination had consistently been made by courts, and the Court rejected any interpretation of the Sixth Amendment that would strip courts of that "traditional" function and overturn "legislative innovations * * * that seek to rein in the discretion that judges possessed at common law." *Id.* at 168, 171.

Ice warned against "wooden, unyielding insistence on expanding the *Apprendi* doctrine far beyond its necessary boundaries." 555 U.S. at 172 (citation omitted). The Court noted that the interpretation of the Sixth Amendment that Ice advanced would threaten to invalidate many other judicial sentencing determinations, such as "the length of supervised release following service of a prison sentence; required attendance at drug rehabilitation programs or terms of community service; and the imposition of statutorily prescribed fines and orders of restitution." *Id.* at 171. "Intruding *Apprendi*'s rule into these decisions on sentencing choices or accoutrements," the Court stated, "surely would cut the rule loose from its moorings." *Id.* at 171-172.

In this case, the court of appeals followed the Court's analysis in *Ice*. The court first gave weight to the "express statement in *Ice*, albeit in dicta, that it is inappropriate to extend *Apprendi* to criminal fines." Pet. App. 28a. The court then applied the "method of reasoning"

that the Court used in *Ice*, *id.* at 29a, finding it "highly relevant that, historically, judges assessed fines without input from the jury." *Id.* at 30a. At the time of the Founding, the court observed, judges enjoyed considerably greater discretion to select the amount of a fine than they did in other aspects of sentencing. *Ibid.*; see *id.* at 31a ("[A]t common law, judges' discretion in imposing fines was largely unfettered."). The court concluded that in this case, as in *Ice*, the form of judicial factfinding at issue does not usurp any traditional jury function. *Id.* at 30a-31a.

The court of appeals rejected petitioner's broader reading of *Apprendi*, explaining that a majority of this Court already rejected it in *Ice*. Pet. App. 31a-32a. The court thus held that here, as in *Ice*, extending *Apprendi*'s rule to the imposition of statutorily prescribed fines "would cut the rule loose from its moorings." *Id.* at 32a (quoting *Ice*, 555 U.S. at 172).[2]

SUMMARY OF ARGUMENT

The constitutional rule announced in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), should not be extended to criminal fines.

A. In *Apprendi*, this Court concluded that a jury must find any fact (other than a prior conviction) that increases a sentence of imprisonment beyond the otherwise-applicable statutory maximum. The Court

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[2] The court determined that, if *Apprendi* applies to fines, the case would need to be remanded because any *Apprendi* error was not harmless. Pet. App. 33a-34a. The court also noted that two other matters would remain open on remand: whether petitioner could be fined up to $500,000 under 18 U.S.C. 3571(c) and whether the $12 million "community service obligation" should be characterized as a fine or a condition of probation. Pet. App. 29a n.14, 34a-35a.

explained that permitting a judge to find a fact that results in an increased maximum sentence of imprisonment essentially punishes the defendant for a greater offense than the offense of conviction, thereby circumventing the constitutional rule that the jury must find guilt on every element of a crime beyond a reasonable doubt. The Court has applied that rule in the context of increased terms of imprisonment and eligibility for the death penalty, explaining that the rule is necessary because factfinding increases the defendant's exposure to the loss of liberty or life.

The Court has not applied the *Apprendi* rule to criminal fines, and in *Oregon* v. *Ice*, 555 U.S. 160 (2009), the Court counseled hesitation before expanding the rule's scope. In holding that the *Apprendi* rule should not be extended to facts that authorize consecutive sentences, the Court rejected the view that any fact increasing the "quantum of punishment" must be found by the jury, *id.* at 166 (citation omitted); instead, it advised that extension of *Apprendi* depends on consideration of the doctrine's core purposes, the historical role of the jury, and the potential effect on the administration of justice.

B. Criminal fines do not implicate the core concerns underlying *Apprendi*. This Court has long recognized that criminal fines, even significant ones, raise fundamentally different concerns from terms of incarceration or the death penalty, because the former involve a deprivation of property, the latter a deprivation of liberty or life. The Court has defined both the jury-trial right and the right to counsel primarily based on whether the defendant faces a term of imprisonment, and it has recognized that those rights sometimes do not apply at all when the only possible punishment is a fine. Because fines do not implicate the same life and liberty concerns

as terms of incarceration or death, the *Apprendi* rule should not be extended to them.

Moreover, the factual findings that influence fine amounts do not raise the concern in *Apprendi* about adding an element that essentially defines a greater offense. Here, as in other instances involving fines, the sentencing judge's role is to establish the appropriate punishment for the defendant's course of conduct once the jury already has found that the defendant committed the statutory violation charged. Judicial factfinding in that setting does not result in punishment for a greater crime than that stated in the indictment.

C. The historical record confirms that fines lie outside the jury's traditional domain. As this Court recognized in *Apprendi*, English common-law judges had substantially more discretion with respect to fines than they did in imposing terms of imprisonment or death, and that tradition continued in the early United States. In common-law England, judges had nearly unfettered discretion in setting fine amounts, and the same was true in many American Colonies and early States. Although some early American statutes set maximum fine amounts, determining the amount of a criminal fine remained a judicial function.

A few English and American statutes of this period set fine amounts based on particular facts. The practice under these statutes was that judges found the facts that influenced the fine amount. That practice was confirmed by *United States* v. *Tyler*, 11 U.S. 285 (1812), where this Court considered an early federal statute prohibiting putting goods on a carriage for foreign transport. The statute set the penalty for the crime at a fine of four times the value of the goods; the Court held that "no valuation by the jury was necessary" be-

cause the court was responsible for imposing the fine. *Id.* at 285-286.

Petitioner cites a smattering of state statutes authorizing juries to impose fines, but these reflected a few States' experimentation with jury sentencing, not an understanding of the common-law role of the jury. Those statutes characteristically did not place factfinding responsibility on juries, but instead transferred sentencing discretion to them wholesale—which is quite different from the extension of *Apprendi* that petitioner seeks. Petitioner also identifies a few state decisions where juries found the value of goods in larceny cases, but these also do not demonstrate a consensus in common-law practice. The prevailing practice in England and the United States was that judges, not juries, would find facts to set fine amounts.

D. Applying the *Apprendi* rule to criminal fines would significantly undercut state and federal legislative reforms to guide judges' sentencing discretion. Many state and federal statutes allow courts to set fines based either on the number of days of a violation or the gain or loss resulting from the violation. These provisions were adopted in order to proportion fines to the harm the defendant's offense caused and to treat similarly situated defendants alike.

Requiring juries to find these facts would not only undo state and federal legislative determinations, it would create significant complications and risks of unfairness. For example, the full extent of the gain from the offense or loss to the victims may not be known at the time of the indictment, particularly when calculating gain or loss is complex. And proving gain or loss to the jury may require the introduction of evidence that is prejudicial to the defense or confusing to the jury. Bi-

furcated trials may become necessary. The Constitution has never been understood to require those results before a court imposes fines.

ARGUMENT

THE CONSTITUTION PERMITS A JUDGE TO DETERMINE THE NUMBER OF DAYS OF A CONVICTED DEFENDANT'S VIOLATION IN ORDER TO SET THE AMOUNT OF A CRIMINAL FINE UNDER 42 U.S.C. 6928(d)

A. *Oregon* v. *Ice* Makes Clear That Any Expansion Of *Apprendi* Requires Careful Consideration Of The Doctrine's Purposes, Historical Practice, And Impact On The Administration Of Justice

1. In *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), this Court considered whether the Constitution requires that the jury find facts that increase a sentence of imprisonment beyond the statutory maximum that would apply without the finding. Apprendi had pleaded guilty to violating a New Jersey firearm-possession statute with a ten-year statutory maximum term of imprisonment. *Id.* at 469-470. The State sought, and the judge applied, a sentencing enhancement on the ground that Apprendi committed the firearm offense with a racially biased purpose; the enhancement raised the maximum sentence from 10 to 20 years of imprisonment, and Apprendi received a 12-year term. *Id.* at 470-471.

This Court held the sentence unconstitutional. *Apprendi*, 530 U.S. at 476, 491-492. The Court observed that the due process and jury-trial rights, taken together, require a jury to find every element of a crime beyond a reasonable doubt before a defendant is deprived of his liberty. *Id.* at 476-477. In Apprendi's case, the Court explained, the biased-purpose requirement should be treated like an element because it substan-

tially increased the maximum prison sentence available, essentially making firearm possession with a biased purpose a greater offense than simple firearm possession. *Id.* at 476, 494 n.19, 495-496. The Court held, in the context of an offense punished by imprisonment, that "any fact" other than the fact of a prior conviction "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490.

Two years later, the Court applied *Apprendi* in *Ring* v. *Arizona*, 536 U.S. 584 (2002), which held Arizona's death-penalty statute unconstitutional insofar as it allowed the sentencing judge, rather than the jury, to find aggravating circumstances that made a defendant eligible for the death penalty. *Id.* at 609. The Court explained that, as in *Apprendi*, the state statute's "aggravating factors operate as 'the functional equivalent of an element of a greater offense'" and therefore must be found by a jury. *Ibid.* (quoting *Apprendi*, 530 U.S. at 494 n.19).

The Court then extended *Apprendi* in a series of cases challenging judicial factfinding in establishing the range of imprisonment. See *Blakely* v. *Washington*, 542 U.S. 296, 303-305 (2004) (factfinding permitting a sentence in excess of the standard range in a state guidelines sentencing scheme); *United States* v. *Booker*, 543 U.S. 220, 230-244 (2005) (factfinding resulting in an increased sentencing range under mandatory federal Sentencing Guidelines); *Cunningham* v. *California*, 549 U.S. 270, 288-289 (2007) (finding of aggravated circumstances permitting imposition of upper-term sentence under state determinate-sentencing scheme).

Significantly, each of these cases involved judicial factfinding that increased the maximum possible sen-

tence of imprisonment for a particular offense and resulted in a longer term. See *Blakely*, 542 U.S. at 299-300 (finding of deliberate cruelty increased the maximum possible sentence for kidnaping from 53 to 90 months of imprisonment); *Booker*, 543 U.S. at 227-228 (Booker: drug-quantity finding increased maximum sentence available for drug possession with intent to distribute from 262 months to life imprisonment; Fanfan: drug-quantity finding increased maximum sentence available for drug possession with intent to distribute from 78 to 235 months of imprisonment); *Cunningham*, 549 U.S. at 275-276 (finding of six aggravating factors increased maximum sentence available for child sexual abuse from 12 to 16 years of imprisonment). This Court, then, has applied *Apprendi* only in cases involving imprisonment or the death penalty, where a fact makes the defendant eligible for a sentence of imprisonment or death beyond the otherwise-applicable statutory maximum and the defendant received the enhanced sentence.

2. In *Oregon* v. *Ice*, 555 U.S. 160 (2009), the Court clarified that *Apprendi* should not be extended beyond those circumstances without careful consideration of the rule's purposes, historical origin, and practical effect. The particular question in *Ice* was whether, once a defendant has been tried and convicted for multiple offenses, a jury must determine a fact necessary to impose consecutive sentences. *Id.* at 163.

Ice was sentenced under an Oregon law that allows a judge to impose consecutive sentences for two offenses arising out of the same course of conduct only if the second offense showed the defendant's willingness to commit multiple crimes or caused greater or different harm. 555 U.S. at 165. This Court held that the Sixth Amend-

ment allowed the judge to make that determination. *Id.* at 168, 172.

The Court explained that, to establish a constitutional right to a jury determination, the defendant must do more than merely show that the applicable statutory law creates an "'entitlement' to predicate findings." 555 U.S. at 170. Instead, he must show that the proposed extension implicates the "core [Sixth Amendment] concerns" underlying *Apprendi*, is supported by "historical practice," and would not hamper the "administration of [the States'] criminal justice systems." *Id.* at 163-164, 169. The Court counseled caution "extend[ing] the *Apprendi* * * * line of decisions," because state legislatures' attempts to guide judges' sentencing discretion should be respected "absent [a] genuine affront to *Apprendi*'s instruction." *Id.* at 163, 172.

The Court determined that imposition of consecutive sentences does not implicate the key concern identified in *Apprendi*, which is that a jury must find the elements of each distinct offense beyond a reasonable doubt; to the contrary, historically the jury "played no role in the decision to impose sentences consecutively or concurrently." 555 U.S. at 168-170. The Court also recognized that extending *Apprendi* to consecutive-sentence determinations would intrude on States' efforts to guide judges' sentencing discretion to promote proportional and fair sentencing. *Id.* at 171. Such an expansion would be "difficult for States to administer," because requiring juries to find the predicate facts for consecutive sentencing could prejudice the defense or require "bifurcated or trifurcated" trials. *Id.* at 172. Accordingly, the Court rejected the view that all facts that increase the "quantum of punishment" must be found by a jury, *id.* at 166 (citation omitted), and it held that the

Sixth Amendment does not require that a jury find the facts that permit the imposition of consecutive sentences, *id.* at 163, 172.

3. Contrary to petitioner's contention (Br. 23-27), this Court has never applied *Apprendi* to criminal fines. The Court recognized as much in *Ice* when it suggested that *Apprendi* should not apply to fines. The Court stated that "[t]rial judges often find facts about the nature of the offense or the character of the defendant" in "the imposition of statutorily prescribed fines," and it suggested that "[i]ntruding *Apprendi*'s rule into" such a decision "would cut the rule loose from its moorings." *Ice*, 555 U.S. at 171-172. Indeed, in *Apprendi* itself the Court suggested that fines should be treated differently from terms of imprisonment or death because English common-law judges had vast sentencing discretion when it came to fines. *Apprendi*, 530 U.S. at 480 n.7; see *Jones* v. *United States*, 526 U.S. 227, 244-245 (1999); see also pp. 28-29, *infra*.

Petitioner asserts (Br. 23) that "express language" in *Apprendi* and its progeny makes clear that the *Apprendi* rule applies to fines. But *Ice* specifically rejected the argument petitioner now makes—that any fact that increases the "quantum of punishment" must be found by the jury. 555 U.S. at 166 (citation omitted). And the Court did so while acknowledging the seemingly broad language in *Apprendi* itself. See *id.* at 167 (quoting *Apprendi* language referencing "any fact" that "increases the penalty for a crime" beyond the statutory maximum, 530 U.S. at 490). As the court of appeals correctly explained, "[t]o the extent that excluding criminal fines from *Apprendi* requires a more restrained" reading of the language in *Apprendi*, "it is the Supreme

Court in *Ice* that has imposed that restraint." Pet. App. 32a.

Petitioner also contends (Br. 25-26) that *Booker* establishes that the *Apprendi* principle extends to fines, because *Booker* applied *Apprendi* to the mandatory federal Sentencing Guidelines, which include provisions addressing fines for organizations. But neither sentence the Court reviewed in *Booker* included a criminal fine, see *Booker*, 543 U.S. at 227-228, and the Sixth Amendment question the Court addressed was whether factual determinations that increased the defendants' Guidelines ranges of imprisonment should be treated the same as factual determinations that increase a sentence beyond a statutory maximum, *id.* at 228-230, 233-237. The Court did not mention the fine provisions of the Guidelines, much less hold that juries must make factual findings that influence fine amounts. *Id.* at 230-237, 245-265. Moreover, the Court's remedial holding acknowledged that the mandatory application of some portions of the Guidelines may be constitutional, but it made the Guidelines advisory on a wholesale basis in order to avoid "administrative complexities." *Id.* at 266-267. In any event, petitioner's reading of *Booker* cannot be correct, because *Ice* clarified that the application of *Apprendi* to fines is an open issue. 555 U.S. at 171-172.

4. What petitioner seeks in this case is to expand *Apprendi* to a new context. Whether to do so depends not on "wooden, unyielding insistence on expanding the *Apprendi* doctrine far beyond its necessary boundaries," *Ice*, 555 U.S. at 172 (quoting *Cunningham*, 549 U.S. at 295 (Kennedy, J., dissenting)), but on a careful analysis of whether the expansion is warranted in light of the doctrine's core concerns, historical practice, and the potential impact on the administration of criminal

justice, *id.* at 163-164. In this case, all three of those factors counsel against applying *Apprendi* to criminal fines.

B. Fines Do Not Implicate The Core Concerns Underlying *Apprendi*

1. The holding in *Apprendi* is grounded in the principle that the jury must find the facts that result in a term of imprisonment beyond the statutory maximum because of the significant liberty interests involved. *Apprendi* observed that if "a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances," "the loss of liberty and the stigma attaching to the offense are heightened," and so the defendant must be afforded a jury determination of the circumstances supporting the increased term of imprisonment. 530 U.S. at 483-484; see *In re Winship*, 397 U.S. 358, 364 (1970) (explaining that the requirement of proof beyond a reasonable doubt is necessary because a defendant facing a loss of liberty has "an interest of transcending value" at stake). The Court explained that the "procedural protection[]" of a jury determination of any fact increasing the defendant's sentence of imprisonment "reduce[s] the risk of imposing such deprivations erroneously." *Apprendi*, 530 U.S. at 484.

In later decisions, the Court explained the constitutional justification for requiring jury determinations of sentence-enhancing facts by pointing to the heightened concerns raised by depriving a person of life or liberty. "The Framers would not have thought it too much to demand," the Court stated in *Blakely*, "that, before depriving a man of three more years of his liberty," the government should have to submit the additional fact to

a jury. *Blakely*, 542 U.S. at 313-314. In *Ring*, the Court made the same point with respect to the death penalty: "[the] dispositive question * * * 'is not one of form, but of effect,'" and a fact necessary to deprive a defendant of his life therefore must be found by a jury. 536 U.S. at 602 (quoting *Apprendi*, 530 U.S. at 494). In each decision, the Court justified applying *Apprendi* to enhanced imprisonment or death by the seriousness of those consequences. Accord *Cunningham*, 549 U.S. at 292; *Booker*, 543 U.S. at 231-232.

2. This Court long has recognized that "imprisonment and fines are intrinsically different." *Muniz* v. *Hoffman*, 422 U.S. 454, 477 (1975). Fines "cannot approximate in severity the loss of liberty that a prison term entails." *Blanton* v. *City of N. Las Vegas*, 489 U.S. 538, 541-542 (1989) (citation omitted). Because fines involve a lesser and fundamentally different type of deprivation than incarceration or death, the Court has found only limited Sixth Amendment rights with respect to fines. The same distinctions counsel against extending *Apprendi* to fines.

a. This Court has defined the scope of the Sixth Amendment jury trial right based on the length of the prison term faced by the defendant. A defendant has a right to a jury trial for "serious" offenses, but not "petty" offenses, and the severity of the maximum authorized penalty determines whether an offense is serious or petty. *Blanton*, 489 U.S. at 541; see *Duncan* v. *Louisiana*, 391 U.S. 145, 159-162 (1968). This holding recognizes that "[s]o-called petty offenses were tried without juries both in England and in the Colonies." *Id.* at 160. In defining what offenses are "petty," the Court has focused on the degree of deprivation of liberty, holding that "no offense can be deemed 'petty' * * * where

imprisonment for more than six months is authorized," *Baldwin* v. *New York*, 399 U.S. 66, 69 (1970) (plurality opinion), and that offenses punishable by less than six months of imprisonment are presumed petty, *Blanton*, 489 U.S. at 543. "Primary emphasis," the Court has said, "must be placed on the maximum authorized period of incarceration" because a significant loss of liberty is "the most powerful indication whether an offense is 'serious.'" *Id.* at 542.

When confronted with the question whether a defendant facing a fine-only sentence was entitled to a jury trial, the Court distinguished between the severe loss of liberty resulting from incarceration and the lesser property deprivation occasioned by a fine. See *Muniz*, 422 U.S. at 475-477. "From the standpoint of determining the seriousness of the risk and the extent of the possible deprivation," the Court observed, fines and imprisonment are "intrinsically different": "It is one thing to hold that deprivation of an individual's liberty beyond a six-month term should not be imposed without the protections of a jury trial, but it is quite another to suggest that * * * a jury is required where any fine greater than $500 is contemplated." *Id.* at 477. Accordingly, the Court held in *Muniz* that a labor union facing a fine-only sentence of up to $10,000 for criminal contempt had no right to a jury trial. *Ibid.* The Court has repeated the critical distinction between fines and imprisonment for jury-trial purposes on numerous occasions.[3]

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[3] See, *e.g.*, *Lewis* v. *United States*, 518 U.S. 322, 326 (1996) (the Court "place[s] primary emphasis on the maximum prison term authorized" because "the deprivation of liberty imposed by imprisonment" makes it the "best indicator" of a crime's seriousness); *United States* v. *Nachtigal*, 507 U.S. 1, 5 (1993) (a "monetary penalty" such as a fine is "far

That is not to say that the jury-trial right is wholly inapplicable to fine-only sentences. Indeed, petitioner received a jury trial here. Although the Court "has not specified what magnitude of [a] fine" makes a crime serious enough to warrant a jury trial, it has held that a $54 million fine imposed on a labor union for criminal contempt is sufficient. *International Union, United Mine Workers* v. *Bagwell*, 512 U.S. 821, 837 & n.5 (1994). But even when a jury trial is required on the underlying crime, the Court has not held that a jury finding is required as to all facts authorizing the amount of the fine.

b. The Court likewise has defined the Sixth Amendment right to counsel by distinguishing liberty deprivations from the lesser penalty of monetary fines. An indigent defendant has a right to appointed counsel in a felony case, *e.g.*, *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963), but for a misdemeanor, counsel is required only when the defendant actually is sentenced to imprisonment, *e.g.*, *Argersinger* v. *Hamlin*, 407 U.S. 25, 37 (1972). The "central premise" of that rule is that "actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment" because it deprives the defendant of liberty. *Scott* v. *Illinois*, 440 U.S. 367, 373 (1979); see *Gideon*, 372 U.S. at 343 (right to counsel for felonies necessary to "[e]nsure [the] fundamental human rights of life and liberty" (citation omitted)). Focusing on whether the "accused is deprived of his liberty," the Court recognized that "imprisonment for however short a time" generally has much more severe con-

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less intrusive than incarceration"); *Baldwin*, 399 U.S. at 70 (plurality opinion) (key question is whether the punishment at issue "involve[s] the deprivation of the liberty of the citizen" (quoting *Callan* v. *Wilson*, 127 U.S. 540, 549 (1888)).

sequences than a punishment "where the loss of liberty is not involved." *Argersinger*, 407 U.S. at 32, 37 (citation omitted).

For that reason, the Court held in *Scott* v. *Illinois*, *supra*, that a defendant who had been convicted of shoplifting and sentenced only to a $50 fine was not entitled to appointed counsel. 440 U.S. at 368, 373-374. The Court contrasted the "severe" sanction of incarceration with punishment by a fine, and it concluded that "actual imprisonment" is "the line defining the constitutional right to appointment of counsel." *Id.* at 372-373. The distinction between fines and imprisonment, the Court remarked, "is eminently sound." *Id.* at 373. The Court has reaffirmed that Sixth Amendment distinction between imprisonment and fines in other cases.[4] Accordingly, the constitutional "line [has] be[en] drawn between criminal proceedings that resulted in imprisonment, and those that did not." *Nichols* v. *United States*, 511 U.S. 738, 746 (1994).

3. *Apprendi* should not be extended to criminal fines because fines do not implicate the same significant interests as incarceration and the death penalty. The Court has recognized that fines and imprisonment are fundamentally different for Sixth Amendment jury-trial purposes, and that recognition is significant here, because the *Apprendi* doctrine is premised on the jury-trial right. See *Apprendi*, 530 U.S. at 476-477; see also, *e.g.*, *Blakely*, 542 U.S. at 305 (*Apprendi* reflects "the need to give intelligible content to the right of jury trial").

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[4] See *Alabama* v. *Shelton*, 535 U.S. 654, 661 (2002); *Nichols* v. *United States*, 511 U.S. 738, 743 (1994); *Lassiter* v. *Department of Soc. Servs.*, 452 U.S. 18, 26 (1981) (civil context); see also, *e.g.*, *Glover* v. *United States*, 531 U.S. 198, 203 (2001) ("[A]ny amount of actual jail time has Sixth Amendment significance.").

The right to a jury trial, first and foremost, protects a defendant against arbitrary or unjustified imprisonment or death. The "principle [that] lies at the heart of the Sixth Amendment" is that "[w]hen a defendant's liberty is put at great risk, he is entitled to have the trial conducted to a jury." *Lewis*, 518 U.S. at 339 (Kennedy, J., concurring in the judgment). *Apprendi* required juries to determine facts that increase a defendant's sentence beyond the otherwise-applicable maximum because of the greater "loss of liberty" and associated "stigma." 530 U.S. at 484; see *id.* at 495. Similarly, in *Ring*, the factfinding exposed the defendant to potential loss of life, the most severe deprivation the government may impose. 536 U.S. at 602-604.

Concerns about arbitrary or erroneous deprivations of life and liberty, which animate the jury-trial guarantee, are not present here. Financial penalties alone are at stake—in this case, for a felony hazardous-waste violation that the jury has already found to be proved beyond a reasonable doubt. The stigma of conviction flows from the jury's verdict. The judge's factfinding solely determines the violation's duration and thus sets the boundaries for the judge's discretion to impose a fine. It would be anomalous for the Court to extend *Apprendi* to such fine-related determinations when the doctrine does not apply to every case involving an increased sentence of *imprisonment*. See *Ice*, 555 U.S. at 172. Factual determinations that bear on fines, rather than incarceration, present a far weaker case for jury determination than *Ice*, because the primary concerns motivat-

ing *Apprendi*—and this Court's jury-trial jurisprudence more generally—are missing.[5]

Petitioner does not acknowledge the Court's repeated distinction between fines and sentences of imprisonment or death in the Sixth Amendment context. Instead, it focuses largely on the Excessive Fines Clause of the Eighth Amendment, arguing that fines are punishment. Pet. Br. 46-47. But the Eighth Amendment's substantive protection against the imposition of excessive fines reinforces the lack of need to extend *Apprendi*'s procedural right to a jury trial in setting the outer boundaries of a fine. The Framers provided an explicit proportionality safeguard against undue fines; *Apprendi* is not necessary to avoid arbitrariness. Because the heightened concerns about erroneous deprivations of life and liberty in *Apprendi* and its progeny are absent in the case of fines, and because the Eighth Amendment affords substantive protection against excessive fines, applying the *Apprendi* jury-trial rule to fines "would cut the rule loose from its moorings." *Ice*, 555 U.S. at 172.

4. Applying *Apprendi* to fines also is unwarranted because the judicially found facts typically involve only quantifying the harm caused by the defendant's offense, as opposed to defining a separate set of acts for punishment.

In *Apprendi*, the Court was concerned that New Jersey had "singled out" two different acts for punishment,

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[5] Indeed, in some criminal cases involving fine-only sentences, a defendant has no jury trial right at all. See, *e.g.*, *Muniz*, 422 U.S. at 475-477. *Apprendi* could not apply in those circumstances: if the defendant has no right to a jury determination on the essential elements of the offense, it likewise has no right to a jury determination of facts affecting its fine.

but only required the procedural safeguard of proof beyond a reasonable doubt to a jury for the lesser offense. 530 U.S. at 476. Because of the increased sentence available for firearm possession with a biased purpose, versus simple firearm possession, the Court viewed the biased-purpose fact like an element that would require a jury finding of guilt beyond a reasonable doubt. *Id.* at 476, 494 n.19, 495-496. The Court concluded that the biased-purpose fact was "the functional equivalent of an element of a greater offense than the one covered by the jury's verdict." *Id.* at 494 n.19; see *Ring*, 536 U.S. at 609.

The factual determination at issue here, by contrast, does not make petitioner's offense different or greater than the offense found by the jury. The statute at issue prohibits "knowingly * * * stor[ing] or dispos[ing] of any hazardous waste * * * without a permit." 42 U.S.C. 6928(d)(2)(A). The jury found petitioner guilty of "knowingly storing a hazardous waste, liquid mercury, without a permit." J.A. 140. The district court then imposed sentence, and in doing so, it determined that petitioner had committed this violation for 762 days. Pet. App. 46a-47a; see 42 U.S.C. 6928(d). The court's factual finding only concerned how long petitioner committed the offense found by the jury; the court did not add any fact about how petitioner committed the offense that even arguably transformed the offense into a greater one. This type of judicial fact-finding to assess the harm is typical in statutes where a judge-found fact increases the maximum fine available. See pp. 46-47, *infra*.

Although the Court has made clear that the relevant question is one not of form, but of effect, *Apprendi*, 530 U.S. at 494, the effect of the factual finding here was not

to deny the "requirement[] of trying to a jury all facts necessary to constitute a statutory offense," *id.* at 483. The jury found the offense—thus branding petitioner as a felon and exposing it to criminal punishment. The court's finding of the length of the violation did not transform the crime into a greater offense.[6]

Nor did petitioner lack notice of the acts for which it was fined. *Apprendi* expressed concern that the defendant would not be able to predict the judgment "from the face of the felony indictment" because in that case "[n]one of the counts referred to the hate crime statute" or "alleged that Apprendi acted with a racially biased purpose." 530 U.S. at 469, 478. Here, petitioner could "predict from the face of the indictment" what its sentence could be. *Harris* v. *United States*, 536 U.S. 545, 562 (2002). The indictment charged petitioner with "knowingly stor[ing], and caus[ing] to be stored, hazardous wastes, namely, waste liquid mercury, on the premises of 91 Tidewater Street, Pawtucket, Rhode Island, without a permit issued pursuant to RCRA," "[f]rom on

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[6] Petitioner contends (Br. 31 n.9) that the jury may have disagreed with the district court's finding that petitioner stored hazardous waste illegally for the entire time period alleged in the indictment. That is extremely unlikely, because petitioner never contested that it stored mercury on the site for the entire time period; instead, it contended that it did not need a permit to store the mercury because it intended to reclaim the mercury. See Pet. App. 7a. But even if petitioner intended to reclaim the material, it still needed a permit because the material was "spent." See p. 3, *supra*; see J.A. 123-124; C.A. App. 1631-1637, 1921-1922, 1931-1933, 2238-2242, 2251-2265, 2269-2270. In any event, petitioner's assertion of an intention to reclaim the mercury is refuted by its own internal statements referring to the mercury as "waste" that the company wanted to "get rid of," *id.* at 1047; see Pet. App. 5a, and the deplorable conditions under which it stored the mercury, see *id.* at 3a-4a.

or about September 19, 2002 until on or about October 19, 2004." J.A. 104-105. That language informed petitioner of the nature of the violation and the time period that the government alleged the violation endured. The statute completed petitioner's notice that "upon conviction," it faced a fine for "each day of violation." 42 U.S.C. 6928(d).

Petitioner correctly observes (Br. 30-31) that the district court's finding of fact increased its potential and actual punishment—the fine it received. But this Court in *Ice* expressly rejected the view that *Apprendi* requires a jury to find any facts that "increased the quantum of punishment imposed." *Ice*, 555 U.S. at 166 (internal quotation marks and citation omitted). The question is whether the judicial factfinding at issue "implicates *Apprendi*'s core concern[s]." *Id.* at 170. Because fines involve fundamentally different and lesser degrees of punishment, and because judicial factfinding in setting fines typically involves only assessing the scope of or harm from a violation found by the jury, the Sixth Amendment does not forbid judges from engaging in factfinding to determine the amount of a fine.

C. Criminal Fines Lie Outside The Jury's Traditional Domain

1. As *Ice* reaffirmed, the historical role of the jury bears heavily on the scope of *Apprendi*. 555 U.S. at 168. And this Court has recognized a significant difference in historical practice between judges assessing fines and judges imposing terms of imprisonment or death. For felonies, English judges "had very little explicit discretion in sentencing" because the substantive law "prescribed a particular sentence for each offense." *Apprendi*, 530 U.S. at 479 (quoting John H. Langbein, *The Eng-*

lish Criminal Trial Jury on the Eve of the French Revolution, in *The Trial Jury in England, France, Germany 1700-1900*, at 13, 36-37 (Antonio P. Schioppa ed., 1987)). This "invariable linkage of punishment with crime" allowed the defendant "to predict with certainty the judgment from the face of the felony indictment." *Id.* at 478 (citing 4 William Blackstone, *Commentaries on the Laws of England* 369-370 (1769)).

By contrast, judges had "substantially more * * * discretion" in imposing "sentences of fines or whippings" in misdemeanor cases. *Apprendi*, 530 U.S. at 480 n.7 (internal quotation marks omitted). These sentences were entirely within the judge's discretion, subject only to the limitations that they "be proportionate to the offense, and, by the 17th century, that [they] not be 'cruel or unusual.'" *Ibid.* (citing J.H. Baker, *An Introduction to English Legal History* 584 (3d ed. 1990) (*English Legal History 3d*)); see also *Jones*, 526 U.S. at 244-245 (noting the "the breadth of judicial discretion over fines" in misdemeanor cases, as opposed to the "norm of fixed sentences in cases of felony"). A historical review explains this tradition of nearly unfettered discretion in setting fines.

a. Before criminal fines came amercements—an "'all-purpose' royal penalty" paid to the King or to feudal lords for a wide variety of civil and criminal offenses. *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 269-270 (1989); see 2 Frederick Pollock & Frederick W. Maitland, *The History of English Law Before the Time of Edward I* 513-515 (2d ed. 1898). Originating in the eleventh century, William S. McKechnie, *Magna Carta: A Commentary on The Great Charter of King John* 285 (2d ed. 1914), by the thirteenth century, amercements were "the most common criminal

sanction[s]" in England, *Solem* v. *Helm*, 463 U.S. 277, 284 n.8 (1983). "[M]ost men in England must have expected to be amerced at least once a year." Pollock & Maitland 513. As a result, popular opposition to amercements grew, and "Magna Carta included several provisions placing limits on the circumstances under which a person could be amerced, and the amount of the amercement." *Browning-Ferris*, 492 U.S. at 270.

Magna Carta required that the amount of the amercement be fixed by the person's peers. See Magna Charta, 9 Hen. III, ch. 14 (1225), 1 Stat. at Large 5 (Ruffhead ed.) ("[N]one of the [s]aid amerciaments [s]hall be a[ss]e[ss]ed, but by the oath of hone[s]t and lawful men of the vicinage."). This requirement was not equivalent to a jury trial. Setting the amount of the amercement was a two-step process: a judge would set the maximum amount of the amercement, and then the affeerors (peers of the offender) would "liquidat[e] the amercement to a precise sum" based on the circumstances of the offense and the offender's ability to pay. 4 Blackstone 373; McKechnie 288; Pollock & Maitland 513. The affeerors were "appointed to [the] Office [of affeeror]" to "declare what goods the offender has" and to ensure that he would be able to pay the fine. J. Cowel, *A Law Dictionary: Or the Interpreter of Words and Terms* (1708) (definition of "affeerers"); see 3 Giles Jacob & T.E. Tomlins, *The Law-Dictionary* 73 (1811). Only one or two men served as affeerors in a case, unlike the 12 or 24 men that made up a criminal jury. See Max Radin, *Radin Law Dictionary* 12 (Lawrence G. Greene ed., 1955) (one, two, or four affeerors); Pollock & Maitland 513 ("two [affeerors] seem[ed] to be enough"). Affeerors therefore were different from a jury tasked with deciding guilt or innocence for an indi-

vidual case. See Pollock & Maitland 513; 4 Blackstone 373.

b. Criminal fines differed from amercements. They "originated in the 13th century as voluntary sums paid to the Crown to avoid an indefinite prison sentence" for a crime. *Browning-Ferris*, 492 U.S. at 289 (O'Connor, J., concurring). By the thirteenth century, judges had begun sentencing offenders to imprisonment for their crimes. Pollock & Maitland 517-518. For common-law crimes, judges had broad sentencing discretion, and they often imposed indefinite periods of imprisonment, but then commuted the sentence if the offender paid a fine. *Ibid.*; Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons From History*, 40 Vand. L. Rev. 1233, 1261 (1987). Judges did not actually impose fines as punishment; instead, they "pronounce[d] a sentence of imprisonment and then allowed the culprit to 'make fine'" to avoid imprisonment. Pollock & Maitland 517; see Jacob & Tomlins 72. The amount of the fine was committed to the judge's discretion. Pollock & Maitland 517-518.

By the seventeenth century, criminal fines had been recast as penalties for crimes that could be set only by the courts. Fines had "lost their original character of bargain" and had "replaced amercements as the preferred penal sanction." *Browning-Ferris*, 492 U.S. at 290 (O'Connor, J., concurring); Massey 1253, 1264. A fine had become "a pecuniary punishment for a [criminal] offense" that did not depend upon a term of imprisonment. 1 Edward Coke, *The Institutes of the Laws of England* § 194, at *126(b) (16th ed. rev. 1809) (explaining that "it is called *finis*, because it is an end for that offense"). Although Magna Carta "contained protections against excessive financial punishments imposed

by juries," it had no similar "prohibitions against excessive financial punishments imposed by judges." Massey 1252 (citing 2 Coke *27).[7] Some English judges "took advantage of their newly acquired power and imposed ruinous fines on wrongdoers and critics of the Crown," leading to the prohibition on "excessive Fines" in the 1689 English Bill of Rights. *Browning-Ferris*, 492 U.S. at 290-291 (O'Connor, J., concurring) (citation omitted); see Massey 1263.

c. Thus, by the eighteenth century, a clear difference had emerged in a judge's role in imposing imprisonment or death for felonies and imposing fines and other punishments for misdemeanors. For felonies or treason, statutes set the sentence for the offense (typically death). J.H. Baker, *Criminal Courts and Procedure at Common Law 1550-1800*, in *Crime in England 1550-1800*, at 15, 42-43 (J.S. Cockburn ed., 1977) (*Crime in England*). For misdemeanors, "punishment was at the discretion of the justices, provided that it did not touch life or limb, and was not disproportionate to the offence." J.H. Baker, *An Introduction to English Legal History* 512 (4th ed. 2002). "Fines and whippings" were the most common penalties for misdemeanors, *ibid.*; "[a]ctual sentences of imprisonment for such offenses * * * were rare" because "the idea of prison as a punishment would have seemed an absurd expense." *Apprendi*, 530 U.S. at 480 n.7 (quoting *Crime in England* 43).

Although fines originated as penalties for common-law offenses, by the eighteenth century some statutes

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[7] By the seventeenth century, it had been settled that "[s]tatutes of the Magna Charta * * * extend[ed] to amercements, and not to fines." *Griesley's Case*, 77 Eng. Rep. 530, 532-533 (C.P. 1588).

specified fines as possible punishments.[8] But in those instances as well, judges retained wide discretion in setting the amount of the fines. William Blackstone explained:

> Our statute law has not therefore often ascertained the quantity of fines, nor the common law ever; it directing such an offence to be punished by fine, in general, without specifying the certain sum: which is fully sufficient, when we consider, that however unlimited the power of the court may seem, it is far from being wholly arbitrary; but it[s] discretion is regulated by law. For the bill of rights has particularly declared, that excessive fines ought not to be imposed, nor cruel and unusual punishments inflicted.

4 Blackstone 372 (footnote omitted). Blackstone explained that the legislature generally specified the form of the punishment, but not the amount, and that was acceptable because "[t]he *quantum*, in particular, of pecuniary fines neither can nor ought to be ascertained by an invariable law" because "what is ruin to one man's fortune may be a matter of indifference to another's." 4 Blackstone 371. Thus, "[a]t common law the court may impose" a fine "as part or the whole of a sentence for [a] misdemeanor," and "[t]here [wa]s no general statutory limit to the amount of such fine, except the provisions of

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[8] See, *e.g.*, 4 Blackstone 101 (various "inferior embezzlements and misdemeanours * * * are punished, by statute * * * with fine and imprisonment"); 121 (misprison of a felony punishable by imprisonment and "fine and ransom at the king's pleasure"); 132-133 (receipt of stolen goods was "punished by fine and imprisonment"); 136 (conspiracy to indict an innocent man "punishable by statute * * * , at the discretion of the court, with fine, imprisonment, pillory, whipping, or transportation").

Magna Charta, and the Bill of Rights, against excessive and unreasonable fines and assessments." John Jervis, *Archibold's Pleading, Evidence & Practice in Criminal Cases* 246 (Henry Delacombe Roome & Robert Cracit Ross eds., 26th ed. 1922) (citations omitted).

d. The jury was not responsible for setting the amount of criminal fines in seventeenth- and eighteenth-century England. Crimes were generally divided into felonies, misdemeanors, and summary offenses. Langbein 16-17. Fines were often imposed as punishments for both misdemeanors and summary offenses. *Ibid.* For summary offenses—also known as "petty offenses"—the jury trial right did not apply at all. See *Callan* v. *Wilson*, 127 U.S. 540, 557 (1888); see also *Duncan*, 391 U.S. at 160. When misdemeanor cases were tried before juries, judges retained the power to set the amounts of fines. Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About* Apprendi, 82 N.C. L. Rev. 621, 631-632 (2004); see *id.* at 635 ("The trial jury's main power was deciding guilt," not determining punishments.).

Petitioner has not identified any historical evidence suggesting that English juries found facts relevant to the amounts of criminal fines, except to point out (Br. 41 n.13) that private citizens, and not judges, set the amounts of amercements. But affeerors were not jurors, and by the seventeenth century, it was clear that *courts*, and not individual citizens, set the amount of criminal fines. See pp. 31-32, *supra*. Accordingly, no evidence indicates that finding facts to establish fine amounts was any part of the "historic jury function" in England. *Ice*, 555 U.S. at 163. Instead, setting fines was "a sentencing function in which the jury traditionally played no role." *Ibid.*

2. a. The English norm of broad judicial discretion in setting fines carried over to the early United States. In the Colonies, fines and corporal punishments were the most common non-capital criminal penalties. See Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 Am. J. of Legal Hist. 326, 333-335, 343 (1982) (discussing experience in the Colonies from 1607 until 1775). Because of the "absence of adequate prisons" and the fact that "incarceration would have withdrawn servant labor," fines were "overwhelmingly the most common" punishment. *Id.* at 344-345, 350. In colonial times, juries seldom played a role—let alone an exclusive role—in meting out criminal fines. Rather, "colonial judges, like their English brethren, possessed a great deal of discretion" in setting fines; "the judge could set the amount or even elect between [a fine or whipping], depending on the nature of the defendant and the crime." Lillquist 640-641.

The amount of a criminal fine usually was "within the discretion of the judge": "the precise amount of the fine was established by him and [was] tailored individually to the particular case." Preyer 350. "Fines ranged widely in amount," and the amount "was apparently without limit except insofar as it was within the expectation on the part of the court that it would be paid." Preyer 344, 350. For example, in North Carolina, the "most common punishment imposed" was a fine, and although some early statutes set specific fines for certain crimes, "[North] Carolina judges were, like their English counterparts, allowed by law a large measure of discretion in sentencing," particularly in assessing fines. Donna J. Spindel, *Crimes and Society in North Carolina, 1663-1776*, at 118-124, 126 (1989). Similarly, in Pennsylvania sometimes fine amounts were set by statute, but when

they were not, "the courts fixed whatever fine they felt was fitting." Herbert W.K. Fitzroy, *The Punishment of Crime in Provincial Pennsylvania*, in 2 *Crime and Justice in American History: Courts and Criminal Procedure* 69, 88-90 (Erik K. Monkkonen ed., 1991). See Mark D. Cahn, *Punishment, Discretion, and the Codification of Prescribed Penalties in Colonial Massachusetts*, 33 Am. J. Legal Hist. 107, 127, 132-133 (1989); Edwin Powers, *Crime and Punishment in Early Massachusetts 1620-1692: A Documentary History* 204-206, 415-416 (1966).

b. Judges retained broad discretion in setting fines at the time of the Founding. Early state statutes often provided broad ranges for fines or did not limit the judge's discretion at all.[9] The same was true for federal crimes; "federal judges were entrusted with wide sentencing discretion" and they could "impose * * * any fine up to the statutory maximum." Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 9 (1998) (quoted in *Apprendi*, 530 U.S. at 482 n.9). In the Crimes Act of 1790, for example, most crimes were punishable by imprisonment, fines, or both; the statute set maximum terms of imprisonment and maximum fines, but otherwise left the sentence to the court's discretion. See Act of Apr. 30, 1790, ch. 9, 1 Stat. 112.[10] In the Framing era, Congress often speci-

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[9] See, *e.g.*, 1830 Conn. Pub. Acts 253 (§§ 17-18, 21, 54, 57, 63-68, 70-73, 80-81, 83-84, 87, 92, 115) (establishing ranges for fines); June 1785 R.I. Acts & Resolves 5 (counterfeiting coins punishable by "[s]uch Fines or corporeal Puni[s]hment as the [s]aid Superior Court [s]hall think his, her or their Offences merit, not extending to Life or Limb").

[10] In the Crimes Act of 1790, the maximum fines for larceny and receipt of stolen property depended on judicial factfinding. See p. 43, *infra*.

fied that judges could impose fines up to a specified amount, with the exact amount to be set by the judge,[11] or stated that the fine amount was entirely within the judge's discretion.[12] When federal law specified a maximum fine, it was clear that courts, and not juries, were to set an appropriate amount. See *United States* v. *Mundell*, 27 F. Cas. 23, 24 (C.C. Va. 1795) (No. 15,834)

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[11] See, *e.g.*, Act of Mar. 3, 1791, ch. 15, § 39, 1 Stat. 208 (a supervisor or officer of inspection convicted of oppression or extortion "shall be fined not exceeding five hundred dollars, or imprisoned not exceeding six months, or both, at the discretion of the court"); Process Act, ch. 36, § 7, 1 Stat. 278 (an officer of the court who demands an unlawful fee "shall on conviction thereof in any court of the United States, forfeit and pay a fine not exceeding five hundred dollars, or be imprisoned not exceeding six months, at the discretion of the court"); Act of Mar. 3, 1795, ch. 44, § 17, 1 Stat. 432 (every person who entices a soldier to desert "shall, upon legal conviction, be fined at the discretion of the court, in any sum not exceeding three hundred dollars, or be imprisoned for any term not exceeding one year"); Act of May 7, 1800, ch. 46, § 2, 2 Stat. 62 (any person who entices any artificer or workman employed in an arsenal or armory to desert "shall, upon conviction, be fined at the discretion of the court not exceeding fifty dollars"); Act of Feb. 28, 1803, ch. 9, § 7, 2 Stat. 205 (any consul who gives a false certificate shall "forfeit and pay a fine not exceeding ten thousand dollars, at the discretion of the court").

[12] Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 83 (contempt of court punishable "by fine or imprisonment, at the discretion of said courts"); Crimes Act of 1790 § 21, 1 Stat. 117 (any person who bribes a judge "on conviction thereof shall be fined and imprisoned at the discretion of the court"); *id.* § 26, 1 Stat. 118 (any persons who prosecute a writ of process against a foreign minister, "being thereof convicted, shall be deemed violators of the laws of nations, and disturbers of the public repose, and imprisoned not exceeding three years, and fined at the discretion of the court"); *id.* § 28, 1 Stat. 118 (any person who does violence to an ambassador or public minister, "on conviction, shall be imprisoned not exceeding three years, and fined at the discretion of the court").

(Iredell, Circuit Justice) (explaining that "[t]he common law practice * * * must be adhered to; that is to say, the jury are to find whether the prisoner be guilty, and if unfortunately that should prove to be the case, the court must assess the fine"). And by the mid-nineteenth century, the "amount of a fine [was] usually regulated, in the judge's discretion, by the aggravating or mitigating circumstances of the case." Francis Hilliard, *The Elements of the Law; Being a Comprehensive Summary of American Jurisprudence* 424 (1848).

3. Petitioner acknowledges (Br. 38) that the historical record shows that judges had nearly unfettered discretion at common law to set fines. Petitioner instead relies on a few jurisdictions that varied from the common law. But those instances do not shed light on the relevant question: whether the jury-trial right "at common law" included finding facts that increased the amount of criminal fines. *Ice*, 555 U.S. at 170. The answer is no.

First, petitioner points out (Br. 38-40) that some statutes in the Colonies and early States limited judges' sentencing discretion: while some statutes gave judges complete discretion over the amount of a fine, other statutes specified a maximum fine amount or a particular fine for a crime. That is true, but unenlightening. That legislatures sometimes limited judicial discretion does not say anything about the jury's role. The pertinent point is that the general common-law rule in England made fines "discretionary with the court to award"; that rule was carried over to the United States; and when States varied from that practice, they were varying from the common law. J.A.G. Davis, *A Treatise on Criminal Law, with an Exposition of the Office and*

Authority of Justices of the Peace in Virginia 471 (1838).

Second, it is true, as petitioner (Br. 41-43) and his amici (Crim. Proc. Scholars Br. 21-23) note, that some States experimented with jury sentencing, as opposed to judicial sentencing. Virginia, for example, was an early experimenter with jury sentencing, and juries often set fine amounts as well as other sentences. See, *e.g.*, Nancy J. King, *The Origins of Felony Jury Sentencing in the United States*, 78 Chi.-Kent L. Rev. 937, 937, 960-961 (2003) (*Origins*). During the nineteenth century, several other States, including Kentucky, Georgia, Tennessee, and Alabama, also experimented with jury sentencing. See *id.* at 937, 990-993. But it is well-recognized that this practice of juries setting fines was a deviation from the common law. Davis 471; James M. Matthews, *Digest of the Laws of Virginia, of a Criminal Nature* 85 n.16 (1871); see *Origins* 938 (Virginia's experiment with jury sentencing "was then, and remains today, an unusual delegation of sentencing authority."); 1 Joel P. Bishop, *Commentaries on the Criminal Law* § 632, at 647 (2d ed. 1858) (noting that "the jury does not at common law determine the sentence to be imposed" but that several States chose to deviate from that practice). And nothing suggests that these juries routinely were entrusted with finding particular facts in order to assess particular fines. Rather, these statutes seem to have characteristically transferred sentencing discretion to the jury wholesale. See, *e.g.*, *Holt* v. *State*, 2 Tex. 363, 363-364 (Dec. Term 1847) (explaining that the Texas jury-sentencing statute, 1846 Tex. Gen. Laws 161, "merely substitutes the opinion of the jury for that of the judge") (cited in Pet. Br. 43).

The fact that States sometimes allowed juries to set fines in the eighteenth and nineteenth centuries, therefore, does not demonstrate a consensus about the essential components of the jury-trial right. Indeed, this Court has recognized on numerous occasions that although jury sentencing is permissible, it is not required by the Sixth Amendment. See, *e.g.*, *Libretti* v. *United States*, 516 U.S. 29, 49 (1995) ("Our cases have made abundantly clear that a defendant does not enjoy a constitutional right to a jury determination as to the appropriate sentence to be imposed."); see also *McMillan* v. *Pennsylvania*, 477 U.S. 79, 93 (1986); *Cabana* v. *Bullock*, 474 U.S. 376, 385 (1986); *Spaziano* v. *Florida*, 468 U.S. 447, 459 (1984); *Proffitt* v. *Florida*, 428 U.S. 242, 252 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). At the end of the day, although the historical record in the United States is at times "complex" and "not entirely clear," Pet. Br. 39, the common-law practice of affording judges broad discretion in setting fines is clear, and neither petitioner nor his amici have demonstrated any consensus in England or the United States that the right of trial by jury included the right to have a jury find facts that influence a fine amount.

4. Of course, a history of broad judicial sentencing discretion is not dispositive if common-law juries routinely found certain facts to increase the fine beyond the otherwise-applicable maximum. See *Apprendi*, 530 U.S. at 481-482. But they did not. Although juries sometimes found facts relevant to criminal fines, those sporadic instances do not demonstrate any common understanding that the right to jury trial historically encompassed finding facts that set fines.

a. In England at common law, judges enjoyed nearly unfettered discretion in setting fines, and stat-

utes rarely specified that the amount of a fine depended on a particular finding of fact. As Blackstone explained, the "statute law" rarely "ascertained the quantity of fines," and the "common law" "[n]ever" did, leaving the amount of the fine entirely up to the judge. 4 Blackstone 372. Petitioner has not identified any English statute setting a fine amount based on a finding of fact. The government is aware of a few such statutes. For example, one statute stated that any person convicted of making cables for Her Majesty's ships using "olde and overworn" material would be fined four times the value of each cable,[13] another provided that any person convicted of cheating at gambling would be fined "Five Times the Value of the Sum or Sums of Money or other thing so won,"[14] and a third provided that persons who obtain money or goods by false pretenses be fined "not le[s]s than double the amount or value" of the money or goods.[15] The government has not found any English decisions stating that juries must value the cables, gambling winnings, or goods at issue. That is not surprising, because the general rule was that value did not need to be alleged in the indictment or found by the jury "provided the value [was] sufficient to constitute the offence at law." John Jervis, *Archbold's Summary of the Law*

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[13] *An Acte againste deceitfull making of Cordage*, 35 Eliz. ch. 8 (1592-1593).

[14] *An Act for the better preventing of excessive and deceitful Gaming*, 9 Anne ch. 19 (1710).

[15] *An Act for the more effectual puni[s]hment of per[s]ons who [s]hall attain, or attempt to attain, po[ss]e[ss]ion of goods or money, by fal[s]e or untrue pretences*, 30 Geo. II. ch. 24, pt. II (1757). See also *id.* pt. VI (providing that a person convicted of knowingly buying linens or apparel entrusted to others to wash "[s]hall forfeit double the [s]um given for or lent on the [s]ame").

Relating to Pleading and Evidence in Criminal Cases 51 (W.N. Welsby ed., 11th ed. 1849) (Archbold).

b. In the United States, a few early federal statutes made the amount of a criminal fine depend upon a particular fact. An 1809 federal statute that prohibited putting goods on any ship, vessel, or carriage to transport them outside of the United States provided that the offender would be "fined a sum, by the court before which the conviction is had, equal to four times the value of such specie, goods, wares and merchandise." Enforcement Act (Embargo), ch. 5, § 1, 2 Stat. 506.[16]

This Court considered that statute and confirmed what the text suggests: courts were responsible for valuing the goods in question. See *United States* v. *Tyler*, 11 U.S. 285 (1812). The particular question in *Tyler* was whether, when a defendant was indicted for "loading on carriages * * * nineteen barrels of *pearl-ashes*" and the jury returned a verdict finding the defendant "guilty of the charge alleged against him in [the] indictment" and stating that "the said *pot-ashes* were worth two hundred and eighty dollars," "the verdict was not sufficiently certain as to the value of the property charged in the indictment." *Id.* at 285. This Court held, consistent with the statutory language, that "no valuation by the jury was necessary to enable the Circuit Court to impose the proper fine" and therefore the "part of the verdict" addressing the type of ashes and value "is surplusage, and cannot deprive the United States of the judgment to which they became entitled" upon the jury's finding of guilt. *Id.* at 285-286. See also *United States* v. *Mann*, 26 F. Cas. 1153, 1153 (C.C.N.H. 1812) (No.

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[16] See also Non-Intercourse Act (Foreign Relations), ch. 24, § 13, 2 Stat. 531 (same); Act of Dec. 17, 1813, ch. 1, § 2, 3 Stat. 88 (same).

15,717) (decision under same statute post-*Tyler* stating that "[t]he fine is to be assessed by the court; not found as a penalty by a jury"). The Court's holding is consistent with the general rule that "[i]n the federal courts, the judges fix the fine." 5 St. George Tucker, *Blackstone's Commentaries: with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* 380 n.12 (1803).

The same was true with respect to federal larceny offenses. The Crimes Act of 1790 provided that larceny and receipt of stolen property were punishable by a fine up to four times the amount of the stolen property. See Crimes Act of 1790, §§ 16-17, 1 Stat. 116. This Court considered that provision in *United States* v. *Murphy*, 41 U.S. 203 (1842), and it remarked that under that statute, "the fine is, as to its amount, purely in the discretion of the court." *Id.* at 209. Some decisions considering this statute stated that the value of stolen goods was charged in the indictment, *e.g.*, *Pye* v. *United States*, 20 F. Cas. 99, 99 (C.C.D.C. 1842) (No. 11,488), and in one instance a district court instructed the jury to find the value of the goods, see *United States* v. *Holland*, 26 F. Cas. 343, 345 (C.C.S.D.N.Y. 1843) (No. 15,378). But those decisions—issued well after the framing of the Sixth Amendment and not purporting to apply common law—do not suggest that the jury was required to find value as a constitutional matter. Particularly in light of the Court's statement in *Murphy*, the likelihood is that federal courts generally adhered to the background federal rule that judges set fines in larceny cases.

c. Petitioner relies on (Br. 20) state larceny cases cited in Justice Thomas's concurring opinion in *Apprendi*, in which the fine depended on the value of the

goods stolen and the jury determined that value. See *Hope* v. *Commonwealth*, 50 Mass. (9 Met.) 134, 136-137 (1845); *Commonwealth* v. *Smith*, 1 Mass. (1 Will.) 245, 246-247 (Nov. 1804 Term); see also *Ritchey* v. *State*, 7 Blackf. 168, 169 (Ind. 1844) (arson case relying on reasoning in *Smith*). But these decisions do not show a consensus view supporting the application of *Apprendi* to fines. First, none of these decisions states that juries, and not judges, must find the value of goods because such findings were historically understood to be an essential component of the right of trial by jury. To the extent that States required juries to find such value, they were deviating from the general common-law rule. Particularly because several States experimented with jury sentencing, little weight should be placed on these decisions.

Second, and in any event, larceny was a special case because of the common-law distinction between grand and petit larceny. Grand larceny and petit larceny were different offenses at common law, and the division between the two depended on the value of the goods stolen. See 4 Blackstone 238-239. "So long as the distinction between grand and petit larceny existed, it was necessary, in order to convict the defendant, to prove that the articles * * * exceeded" a certain value. Archbold 194; *English Legal History 3d* 591; see also pp. 13-14, *supra* (noting *Apprendi*'s concern about a defendant being punished for a greater offense than the jury found). But after England abolished that distinction, it became "immaterial whether the goods be proved to be the value laid in the indictment or not." Archbold 193-194; 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 237-238 (1847). Some States apparently still required the jury to "find, in special words, what is the

value of the property stolen, in cases * * * where the sentence depends on the value," but this doctrine was "very exceptional," 2 Joel P. Bishop, *Commentaries on the Law of Criminal Procedure* § 719, at 419-420 (1866), and it apparently was based on adherence to the common-law practice of finding value to distinguish between the two different larceny offenses, see *Hope*, 50 Mass. at 136-137. The relevant question here is whether juries were required to determine a fact when the only effect was to set the fine amount for an offense, not to transform it into a different offense. Although exceptions existed, the "prevailing practice" (*Ice*, 555 U.S. at 169) at common law in both England and early America was that judges determined the facts necessary to impose statutory fines. Petitioner therefore has not demonstrated any longstanding common-law tradition understanding that "the scope of the constitutional right to jury trial" (*id.* at 170) included finding facts relevant to the amount of a criminal fine.[17]

D. Extending *Apprendi* To Criminal Fines Would Interfere With Legislative Prerogatives And The Administration Of Justice

1. *Ice* noted that before "expanding the *Apprendi* doctrine far beyond its necessary boundaries," the Court would consider the effect of such an expansion on the administration of criminal justice. 555 U.S. at 172 (citation omitted). Here, as in *Ice*, numerous federal and state statutes would be affected by petitioner's proposed

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[17] Petitioner also relies (Br. 20) on Justice Thomas's citation in his *Apprendi* concurrence to *United States* v. *Woodruff*, 68 F. 536, 538 (D. Kan. 1895). That decision, rendered more than a century after the Sixth Amendment was ratified and citing no authority for its holding, is too frail a reed to support an extension of *Apprendi*.

rule. These statutes typically allow judges to set fines based on the number of days of the violation, or the gain or loss resulting from the offense.

a. The statute at issue, 42 U.S.C. 6928(d), permits a judge to impose a fine up to $50,000 per day based on the number of days the defendant has illegally stored hazardous waste. Many other federal statutes have similar maximum-fine-per-day-of-violation provisions. See App., *infra*, at 6a-7a.[18] The language and structure of these statutes reveal that judges are to find the number of days as part of sentencing. See, *e.g.*, *United States* v. *Chemetco, Inc.*, 274 F.3d 1154, 1159 (7th Cir. 2001) (concluding that a similar provision in the Clean Water Act, 33 U.S.C. 1319(c)(2), made "the number of days that the violation occurred * * * a factor to be determined after a 'violation' has been established"). Petitioner does not argue otherwise. See Pet. Br. 50-51.

Many state statutes also allow judges to set fine amounts based on the duration of the crime. These statutes have slightly different formulations: some say that upon "conviction" or a "guilty" verdict, the defendant shall be fined up to a certain dollar amount per day of the violation, App., *infra*, at 9a-11a; others allow a per-day penalty when the statute is "violate[d]," *id.* at 12a; and others permit a fine for each day the violation "continues," "exists," or "occurs," or until the violation "ceases," *id.* at 13a. But all of these formulations assume that judges, not juries, will determine the fine amounts, because they separate the facts necessary to

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[18] Federal statutes occasionally set a criminal fine based on the number of days of violation but state that "each day * * * constitute[s] a separate violation," *e.g.*, 42 U.S.C. 4910(b); in such instances, the government acknowledges that the jury would need to find the number of days of the violation.

find guilt from the facts relevant to setting the amount of the fine. Again, petitioner has not disagreed.

b. Federal and state statutes often allow judges to set criminal fines based on the gain or loss resulting from the offense. The primary federal gain-or-loss statute is 18 U.S.C. 3571(d), which authorizes a fine of up to "the greater of twice the gross gain or twice the gross loss" when "any person derives pecuniary gain from the offense" or "the offense results in pecuniary loss to a person other than the defendant." This provision is used in a wide range of criminal cases, including cases involving fraud against the government, securities fraud, and antitrust violations.[19]

Several state laws likewise allow judges to set criminal fines based on the defendant's gain or the victims' losses. These statutes—some of which are general sentencing statutes and some of which are offense-specific—typically state that the "court" shall make the finding of gain or loss and expressly grant the court the authority to conduct a separate hearing if necessary to find these facts. See App., *infra*, 14a-17a. That language makes plain the States' view that judges should make the factual findings of gain or loss in order to set fines during sentencing proceedings, rather than having juries find these facts as part of the criminal trial.

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[19] A few other federal statutes set fines based on a judicial factfinding, such as the federal statutes that base the fines for embezzlement and bribery on the amount embezzled or the value of the bribe. See 18 U.S.C. 645 (embezzlement by court officers); 18 U.S.C. 201(b) (bribery of public officials and witnesses); see also *United States* v. *Rasco*, 853 F.2d 501, 504 (7th Cir.) (explaining that the "penalty provision does not alter or amend the statutory definition of the offense" and the government therefore "was not required to establish the exact value of the bribe"), cert. denied, 488 U.S. 959 (1988).

2. States and the federal government have sound reasons for structuring sentencing decisions in this way. Judges typically have had broad discretion in setting criminal fines, but in the context of certain types of crimes, such as environmental crimes, the state and federal legislatures decided to "rein in th[at] discretion" by conditioning the amount of the fine on facts that quantify the harm caused by the offense. *Ice*, 555 U.S. at 171; see Pet. App. 31a.

For example, setting the fine based on the number of days a defendant committed an environmental crime "promot[es] sentences proportionate to 'the gravity of the offense,'" *Ice*, 555 U.S. at 171 (quoting *Blakely*, 542 U.S. 308), because the harm caused by environmental pollution often depends on the length of time hazardous materials are exposed. Similarly, fines set as a multiple of the gain or loss allow defendants to be punished according to the magnitude of the harms they cause, thereby reducing unjustified disparities in sentences. See *ibid.*; see also 18 U.S.C. 3553(a)(6) (directing federal judges to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" in sentencing).

These discretion-guiding sentencing provisions represent legislative innovations that would be undone by the rule petitioner advocates. For example, the adoption of fines based on the gain or the loss from the offense reflected a concerted federal and state effort to ensure that corporate criminal penalties were proportional to the gravity of the offense. Before legislatures adopted these sentencing provisions, courts had imposed very modest penalties on corporations convicted of seri-

ous crimes.[20] The Model Penal Code was revised to address this concern, adding a provision stating that, as an alternative to maximum fines specified for certain offenses, the court could impose an alternative fine of "any higher amount equal to double the pecuniary gain derived from the offense by the offender." Model Penal Code § 6.03(5), 10A U.L.A. 259 (2001) (adopted 1962). New York was the first jurisdiction to adopt such a provision, and numerous other States and the federal government followed suit. See N.Y. Penal Law § 80.10(2)(b) (McKinney 2009) (enacted 1965); Criminal Fine Improvement Act of 1987, Pub. L. No. 100-185, § 6, 101 Stat. 1279, 1280 (18 U.S.C. 3571(d)). These provisions were designed to "ensure that the wrongdoer does not profit" by "bas[ing] the fine upon the pecuniary gain of the defendant." H.R. Rep. No. 906, 98th Cong., 2d Sess. 17 (1984).

Petitioner suggests (Br. 36) that a fine that turns on the duration of an offense does not implicate "classic" sentencing concerns "about the nature of the offense or the character of the defendant." That suggestion is inaccurate: length of a violation can underscore the degree of harm inflicted by a violation as well as reveal the

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[20] See Richard S. Gruner, *Towards an Organizational Jurisprudence: Transforming Corporate Criminal Law Through Federal Sentencing Reform*, 36 Ariz. L. Rev. 407, 408 (1994) (noting that between 1984 and 1987, the average corporate criminal fine was only $48,164 and "the implicit sentencing message was that corporate crime paid"); Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future*, 71 Wash. U. L.Q. 205, 215 (1993) (citing an empirical study by the United States Sentencing Commission that "found that the median fine courts imposed on organizations convicted of criminal offenses was substantially *less than* the actual dollar loss caused by the offense").

character of the person who committed it. And under current state and federal practice, "[t]rial judges often find facts" (*Ice*, 555 U.S. at 171) about the harm caused by the defendant in order to set a criminal fine. In the absence of any common-law practice requiring juries to make those findings, the Court should not "hem in [the] States" (*ibid.*) and the federal government by taking the function from the courts.

3. Forbidding judges from finding facts necessary to set criminal fines would hamper the administration of criminal justice. As in *Ice*, the "predicate facts" (555 U.S. at 172) for setting the fine may not be known at the time of the indictment. For example, statutes basing the fine amount on the loss caused by the defendant's offense are often used in environmental crimes cases. The exact dollar figure of clean-up costs may not be known at the time of the indictment. See, *e.g.*, Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future*, 71 Wash. U. L.Q. 205, 254-259 (1993). One principal reason the Sentencing Guidelines exclude environmental crimes from their fine provisions is "the potential difficulty in many environmental cases of defining and computing loss." *Id.* at 256; see Sentencing Guidelines § 8C2.1 and comment. (n.2).

Further, documenting the extent of environmental harm caused by the defendant could greatly prejudice the defense at trial. In a case like this one, the government might have to show how much money the defendant saved by not properly disposing of the hazardous waste and by avoiding the required permitting process. Establishing clean-up costs could require the introduction of evidence on the effects and persistence of the

hazardous material on the environment and the particular effects on persons exposed to the hazardous material or displaced by a spill. And evidence of a defendant's wealth may come in as a byproduct of establishing gain or loss. Contrary to petitioner's (Br. 51) and his amici's contention (Chamber Br. 5-7), it is difficult to believe that a corporate defendant would prefer that juries hear this type of evidence. See J.A. 15 (petitioner moved to exclude evidence relating to the apartment complex's contamination as unduly prejudicial).

Aside from a risk of jury prejudice, a rule requiring juries to find gain or loss could result in substantial juror confusion, because such calculations are often complex and involve the introduction of expert testimony that is irrelevant to guilt or innocence. For example, to show a defendant's gain from not obtaining a hazardous waste permit, the government may need to put on testimony from industry experts about how the permits are obtained and how much the process costs, as well as testimony from financial experts, or even business competitors, to testify about the money saved, and competitive advantage gained, from not complying with the law.

Problems of jury prejudice and confusion could perhaps be avoided by "bifurcated or trifurcated trials." *Ice*, 555 U.S. at 172. But as this Court has explained, that type of administrative burden should not be imposed absent a "genuine affront to *Apprendi*'s instruction." *Ibid.* No such affront exists here. The jury has already found petitioner guilty of a serious felony, and the sentencing phase simply "rein[s] in" (*id.* at 171) the judge's historically broad discretion in imposing fines.

Accordingly, the Court has good reason not to extend *Apprendi* to undo state and federal legislative efforts to guide judges' discretion in setting fines. Nothing in the

history or purposes of the Sixth Amendment prohibits judges from deciding facts that set a fine amount above the otherwise-applicable statutory maximum, and such a rule would "cut the [*Apprendi*] rule loose from its moorings." *Ice*, 555 U.S. at 172.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

Statutory Appendix

1. Amendment V of the United States Constitution provides, in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *

2. Amendment VI of the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law * * *

3. 42 U.S.C. 6903 provides, in pertinent part:

Definitions

As used in this chapter:

* * * * *

(5) The term "hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

* * * * *

(27) The term "solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of title 33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923) [42 U.S.C. 2011 et seq.].

4. 42 U.S.C. 6928 provides, in pertinent part:

Federal enforcement

* * * * *

(d) Criminal penalties

Any person who—

* * * * *

(2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter—

(A) without a permit under this subchapter or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C. 1411 et seq.]

* * * * *

shall, upon conviction, be subject to a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed two years (five years in the case of a violation of paragraph (1) or (2)), or both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment under the respective paragraph shall be doubled with respect to both fine and imprisonment.

5. 40 C.F.R. 261.1 provides in pertinent part:

Purpose and scope.

(c) For the purposes of §§ 261.2 and 261.6:

(1) A "spent material" is any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing;

* * * * *

(4) A material is "reclaimed" if it is processed to recover a usable product, or if it is regenerated. * * *

* * * * *

(7) A material is "recycled" if it is used, reused, or reclaimed.

* * * * *

6. 40 C.F.R. 261.2 provides in pertinent part:

Definition of solid waste.

(a)(1) A *solid waste* is any discarded material that is not excluded under §261.4(a) or that is not excluded by a variance granted under §§260.30 and 260.31 or that is not excluded by a nonwaste determination under §§ 260.30 and 260.34.

(2)(i) A *discarded material* is any material which is:

(A) Abandoned, as explained in paragraph (b) of this section; or

(B) Recycled, as explained in paragraph (c) of this section; or

* * * * *

(b) Materials are solid waste if they are *abandoned* by being:

* * * * *

(3) Accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated.

(c) Materials are solid wastes if they are *recycled*—or accumulated, stored, or treated before recycling—as specified in paragraphs (c)(1) through (4) of this section.

* * * * *

(3) *Reclaimed.* Materials noted with a "—" in column 3 of Table 1 are not solid wastes when reclaimed. Materials noted with an "*" in column 3 of Table 1 are solid wastes when reclaimed unless they meet the requirements of §§ 261.2(a)(2)(ii), or 261.4(a)(17), or 261.4(a)(23), or 261.4(a)(24) or 261.4(a)(25).

* * * * *

Table 1

	Use constituting disposal (§ 261.2(c)(1))	Energy recovery/ fuel (§ 261.2(c)(2))	Reclamation (261.2 (c)(3)), except as provided in §§ 261.2 (a)(2)(ii), 261.4(a)(17), 261.4(a)(23), 261.4(a)(24), or 261.4(a)(25)	Speculative accumulation (§ 261.2 (c)(4))
	1	2	3	4
Spent Materials	(*)	(*)	(*)	(*)
. . . . .				
* * *	* * *	* * *	* * *	* * *

* * * * *

APPENDIX B

Selected Federal Statutes With Fine Per Day Of Violation

12 U.S.C. 1467a(i)(1)(A)-(B) (prohibition on violating laws regulating savings and loans)

12 U.S.C. 1785(d)(3) (prohibiting anyone who has been convicted of a criminal offense involving dishonesty or a breach of trust from participating in the affairs of an insured credit union)

12 U.S.C. 1829(b) (prohibiting anyone who has been convicted of any criminal offense involving dishonesty, breach of trust, or money laundering from participating in the affairs of an insured depository institution)

12 U.S.C. 1847(a)(1)-(2) (prohibition on knowingly violating regulations of bank holding companies)

12 U.S.C. 3111 (prohibition on violating laws regulating foreign bank participation in domestic markets)

14 U.S.C. 85 (prohibition on violating maritime regulations)

15 U.S.C. 717t(b) (prohibition on willfully and knowingly violating regulations of natural gas companies)

16 U.S.C. 825o(b) (prohibition on violating regulations made under the Federal Power Act)

30 U.S.C. 1463(b) (prohibition on violating laws and regulations pertaining to deep seabed hard mineral resources)

33 U.S.C. 411 (prohibition on wrongful deposit of refuse, use of or injury to harbor improvements, and obstruction of navigable waters)

33 U.S.C. 1319(c)(1)-(2), (4) (prohibition on violating laws or permit conditions made under the Clean Water Act)

42 U.S.C. 2273(b) (prohibition on violating laws regulating atomic energy licenses by persons responsible for constructing a utilization facility)

42 U.S.C. 6992d(b) (prohibition on violating laws regulating disposal, storage, and treatment of medical waste)

42 U.S.C. 9152(d) (prohibition on violating laws regulating ocean thermal energy conversion)

47 U.S.C. 502 (prohibition on violating rules and regulations pertaining to wire and radio communications)

APPENDIX C

Selected Federal Statute With Fine Based On Gain Or Loss

18 U.S.C. 3571(d) ("If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.")

APPENDIX D

Selected State Statutes With Fine Per Day Of Violation

Statutes providing for fine upon "conviction" or "guilty" verdict

Ark. Code Ann. § 12-79-106 (2003)

Cal. Health & Safety Code §§ 1248.8(a) (West 2008), 25515(a) (West Supp. 2012), 25541 (West Supp. 2012), 25541.3 (West 2010), 100895(a) & (b) (West Supp. 2012), 115215(b), (c) & (e) (West Supp. 2012), 116730(a) & (b) (West Supp. 2012), 121710 (West 2006), 131130(a) & (b) (West Supp. 2012)

Colo. Rev. Stat. §§ 25-7-122.1(1)(b) & (c), (3)(a) & (d), 25-15-310(2) & (3) (2011)

Del. Code Ann. tit. 7, § 7714(c) (2011)

D.C. Code §§ 6-506(1) (2008), 7-2108(g) (2008), 8-231.16(a) (2008)

Fla. Stat. Ann. § 403.727(3)(b) (West 2008)

Haw. Rev. Stat. Ann. §§ 179D-8(b) (Michie 2008), 340E-8(b) (Michie 2008), 342D-35 (Michie 2008)

415 Ill. Comp. Stat. Ann. 5/44(b)(2), (c)(2), (d)(2), (f)(2), (g)(2), (h)(7), (j)(2), (j)(3), (j)(5), (k)(2) & (p)(2) (West 2011); 430 Ill. Comp. Stat. Ann. 100/18(b) (West 2004)

Ind. Code Ann. §§ 13-29-1-14 (Michie 2011), 13-30-10-5(c)(1) & (2) (Michie 2011)

Iowa Code Ann. §§ 455B.146A (West 2004), 716B.2, 716B.3, 716B.4 (West 2003)

La. Rev. Stat. Ann. §§ 30:2076.2(A)(3) & (B)(3) (2000), 30:2117(C) (West Supp. 2012), 30:2183(G)(1) & (2) (West Supp. 2012), 32:1514(A) & (B) (2002), 37:2160(C)(1) (West Supp. 2012)

Me. Rev. Stat. Ann. tit. 38, § 1319-T(1) & (2) (2001)

Md. Code Ann., Bus. Reg. § 11-1001(b) (2010); Md. Code Ann., Envir. § 2-609.1 (2007)

Mich. Comp. Laws §§ 324.3115(2) (West 2007), 324.20139(3) (West Supp. 2011), 325.1021(1) (West Supp. 2011)

Miss. Code Ann. §§ 17-17-67(1) (West Supp. 2011), 21-27-217(3) (West 1999), 49-17-43(5) (West 2011)

Mo. Ann. Stat. §§ 260.425(3)(6) (West 2001), 643.250(2) (West Supp. 2012), 644.076(3) (West 2006)

Mont. Code Ann. §§ 75-5-632 (2009), 82-11-148 (2009)

Nev. Rev. Stat. §§ 445A.705(1) (Michie 2009), 459.600 (Michie 2009)

N.J. Stat. Ann. §§ 13:1E-99.89(f) (West Supp. 2011), 13:1F-10(f) (West Supp. 2011), 13:9A-9(f) (West Supp. 2011), 13:9B-21(f) (West Supp. 2011), 13:19-18(f) (West Supp. 2011), 58:1A-16(f) (West Supp. 2011), 58:4-6(f) (West Supp. 2011), 58:10A-10(f)(1)(a), (2) & (3) (West 2006), 58:16A-63(f) (West Supp. 2011)

N.M. Stat. Ann. § 69-36-18(A) (1997)

N.Y. Envir. Conserv. Law Ann. §§ 71-1933(1) (McKinney Supp. 2012), 71-2113(2) (McKinney Supp. 2012), 71-2705(2) (McKinney Supp. 2012), 71-4303(2) (McKinney 1997), 71-4402(2) (McKinney 1997)

N.C. Gen. Stat. §§ 14-284.2(a) (2011), 75A-10(e) (2011), 76-40(a1)(2) (2011), 130A-26.1(f), (g) & (i)(1) (2011), 143-214.2A(c)(2) (2011), 143-215.6B(f)-(h) (2011), 143-215.88B(e)-(h) (2011), 143-215.94X(a)-(c) (2011), 143-215.104Q(a)-(c) (2011), 143-215.114B(f)-(h) (2011)

Okla. Stat. Ann., tit. 27A , §§ 2-5-116(A) (West 2011), 2-6-206(G)(1)-(4) (West 2011)

S.D. Codified Laws § 34A-2-75 (West Supp. 2011)

Tex. Nat. Res. Code Ann. § 91.604(b) (Vernon 2011)

Utah Code Ann. §§ 19-2-115(3)-(4) & (7)-(8) (2010), 19-5-115(3)-(4) (2010), 19-6-113(4) (2010)

W. Va. Code §§ 16-27-4 (Michie 2011), 22-15-15(b)(3)-(4) (Michie 2009), 22-18-16(a) & (c) (Michie 2009), 29-1H-8 (Michie 2008)

Wyo. Stat. §§ 24-1-133(c), 36-1-119(c), 40-14-604(g), 40-19-118(f) (LexisNexis 2011)

Statutes providing for a per-day penalty when the statute is "violate[d]"

Ala. Code §§ 22-22-14(a), 22-36-9(a) (Michie 2006)

Alaska Stat. §§ 02.40.010(e) (Michie 2010), 31.05.150(e) (Michie 2010)

Conn. Gen. Stat. Ann. §§ 22a-131a(a), (b) & (c) (West 2006), 22a-175(a) (West 2006), 22a-226a (West 2006), 22a-628 (West 2006)

Del. Code Ann. tit. 7, § 6013(a) (2011)

D.C. Code § 44-509(a) (West Supp. 2011)

Haw. Rev. Stat. Ann. §§ 342B-49 (Michie 2008), 342D-32 (Michie 2008), 342D-33 (Michie 2008), 342P-22 (Michie 2008), 342P-23 (Michie 2008)

La. Rev. Stat. §§ 30:4.1(G) (West Supp. 2012), 30:18(A)(4) (West 2007)

Me. Rev. Stat. Ann. tit. 38, § 349(1) & (6) (West Supp. 2011)

Mass. Ann. Laws ch. 21, § 34C (LexisNexis 2007), ch. 21L, § 2(c) (Lexis-Nexis 2007)

N.Y. Exec. Law Ann. § 382(2) (McKinney 2005)

N.D. Cent. Code Ann. § 23-20.3-09(3)-(4) (2002)

Tex. Nat. Res. Code Ann. § 141.102(b) (West 2011)

Utah Code Ann. § 19-5-115(2)-(4) (2010)

Wis. Stat. Ann. § 283.91(3) (West 2010)

Statutes providing for fine for each day violation "continues," "exists," or "occurs," or until the violation "ceases"

Ark. Rev. Stat. Ann. § 23-3-304(a) & (b) (Michie Supp. 2011)

D.C. Code §§ 6-703.06 (2008), 6-1110(a) (Supp. 2011), 32-414(a) (2010), 44-212(e) (Supp. 2011)

La. Rev. Stat. §§ 6:950.4(D), 6:1338(B), 30:2025(F)(1)(a) & 2(a) (2005)

Md. Code Ann., Envir. § 9-413(b) (2007), Md. Code Ann., Pub. Util. Cos. § 11-101(g) (2010)

Mass. Ann. Laws ch. 21, § 42 (LexisNexis 2007), ch. 21A, §§ 13, 14 (LexisNexis 2007), ch. 91, §§ 23, 55 (LexisNexis 2005), ch. 111, §§ 160, 160A, 162 (LexisNexis 2004), ch. 111F, § 3(b) (LexisNexis 2004)

Mont. Code Ann. § 80-15-414(1) (2009)

Okla. Stat. Ann., tit. 17, §§ 158.59, 191.11 (West Supp. 2012); tit. 18, § 381.73(I) (West 1998); tit. 82, § 1324.50(A) & (B) (West Supp. 2012)

APPENDIX E

Selected State Statutes With Fine Based On Gain Or Loss

General criminal sentencing provisions

Ala. Code § 13A-5-11(c) (Michie Supp. 2011) ("The court may conduct a hearing upon the issue of defendant's gain or the victim's loss * * * ")

Conn. Gen. Stat. Ann. § 53a-44 (West 2007) ("the court * * * may sentence the defendant to pay an amount, fixed by the court, not to exceed double the amount of the defendant's gain from the commission of the offense"; "the court shall make a finding as to the amount of the defendant's gain," and "if the record does not contain sufficient evidence to support such a finding, the court may conduct a hearing upon the issue")

Fla. Stat. § 775.083(1)(f) (West 2008) (authorizing fine of an "amount equal to double the pecuniary gain derived from the offense by the offender or double the pecuniary loss suffered by the victim")

Me. Rev. Stat. Ann. tit. 17-A, § 1301(2) (West Supp. 2011) ("When the court imposes a fine based on the amount of gain, the court shall make a finding as to the defendant's gain from the crime. If the record does not contain sufficient evidence to support a finding, the court may conduct * * * a hearing on this issue.")

Mo. Ann. Stat. § 560.011(2) (West 1999) ("When the court imposes a fine based on gain the court shall make a finding as to the amount of the offender's gain from the crime. If the record does not contain sufficient evi-

dence to support such a finding, the court may conduct a hearing upon the issue.")

N.J. Stat. Ann. § 2C:43-3(e) (West 2005) ("the court shall make a finding as to the amount of the gain or loss, and if the record does not contain sufficient evidence to support such a finding the court may conduct a hearing upon the issue")

N.Y. Penal Law § 80.00(3) (McKinney 2009) ("the court shall make a finding as to the amount of the defendant's gain from the crime"; "the court may conduct a hearing upon such issues")

Or. Rev. Stat. § 161.625(5) (2011) ("When the court imposes a fine for a felony the court shall make a finding as to the amount of the defendant's gain from the crime. If the record does not contain sufficient evidence to support a finding the court may conduct a hearing upon the issue.")

Offense-specific "gain or loss" provisions

Colo. Rev. Stat. Ann. § 18-17-105(2), (3) (2011) (penalties for organized crime; "[t]he court shall hold a hearing to determine the amount of the fine")

Del. Code. Ann. tit. 11, § 939(e) (Michie Supp. 2010) (penalties for computer-related offenses; "the court shall make a finding as to the amount of the defendant's gain from the offense" and "may conduct a hearing upon the issue")

Fla. Stat. Ann. § 812.032 (West 2006) (theft, robbery, and related crimes; "[t]he court shall hold a hearing to

determine the amount of the fine to be imposed under this section")

Fla. Stat. Ann. § 895.04(2), (3) (West 2000) (racketeering; "[t]he court shall hold a hearing to determine the amount of the fine")

La. Rev. Stat. Ann. § 15:1354(B), (C) (West Supp. 2012) (racketeering; "[t]he court shall hold a hearing to determine the amount of the fine")

Minn. Stat. Ann. § 609.904 (West 2009) (racketeering; "[t]he district court shall hold a hearing to determine the amount of the fine" and shall consider various additional factors, such as "the seriousness of the conduct, whether the amount of the fine is disproportionate to the conduct in which the person engaged, its impact on victims and any legitimate enterprise involved in that conduct, as well as the economic circumstances of the convicted person")

Miss. Code Ann. § 97-43-7(2), (3) (West 2011) (racketeering; "[t]he court shall hold a hearing to determine the amount of the fine")

N.H. Rev. Stat. Ann. § 638:18(IV) (LexisNexis Supp. 2011) (computer-related offenses; fine is "fixed by the court" and "the court shall make a finding as to the amount of the defendant's gain from the offense")

Ohio Rev. Code Ann. § 2923.32(B)(2)(c) (LexisNexis 2010) (corruption; "[t]he court shall hold a hearing to determine the amount of fine")

Okla. Stat. tit. 22 § 1404(B) (West Supp. 2012) (racketeering; "[t]he district court shall hold a separate hearing to determine the amount of the fine")

Tex. Parks & Wildlife Code § 12.410(c) (West 2002) (violation of fish and wildlife laws; "if a court finds that the corporation or association gained money or property or caused personal injury, property damage, or other loss through the [violation] * * * , the court may sentence the corporation or association to pay a fine in an amount fixed by the court, not to exceed double the amount gained or caused by the corporation to be lost, whichever is greater")

Wis. Stat. Ann. § 946.84(2), (3) (West 2005) (racketeering; "[t]he court shall hold a hearing to determine the amount of the fine")

REPLY BRIEF

RECORD
AND
BRIEFS

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IN THE

Supreme Court of the United States

SOUTHERN UNION COMPANY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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INTRODUCTION

The United States offers little in response to petitioner's core argument that all available evidence – the express language and historical underpinnings of this Court's decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000); the Court's application of the *Apprendi* principle in subsequent cases; judicial consensus prior to the decision below; and the United States' own nearly decade-long view – confirms that *Apprendi* applies equally to criminal fines as to incarceration. The reason for that is simple: the *Apprendi* principle itself is derived from historical practices, and this principle is on a stronger historical footing with respect to fines than with respect to incarceration because fines were a common form of punishment at the time of our nation's Founding, while incarceration was not. In an effort to overcome these facts, the United States offers only previously rejected and unsound arguments based in policy that, in any event, do not trump the constitutional imperatives underlying *Apprendi*. The First Circuit's decision to carve out a principal form of punishment from *Apprendi*'s scope warrants reversal.

ARGUMENT

I. THE SENTENCE VIOLATED SOUTHERN UNION'S FIFTH AND SIXTH AMENDMENT RIGHTS.

1. The United States has no response to petitioner's core arguments demonstrating that nothing in this Court's reasoning or language in *Apprendi*, or in its subsequent decisions applying *Apprendi*, provides any basis upon which to distinguish fines from incarceration for Fifth and Sixth Amendment purposes. What is striking is that

the United States has no response at all to petitioner's argument that the *Apprendi* principle necessarily applies to fines because this Court, in deriving that principle, specifically considered and relied upon historical evidence regarding the extent of judicial discretion in setting fines. Pet. Br. 17-23. And, although the United States acknowledges that fines were a common punishment in the American colonies while incarceration was rarely used, Resp. Br. 35, it has no answer to petitioner's argument that *Apprendi*'s conclusions about the Founders' understanding of the jury-trial guarantee are therefore on a much stronger historical footing with respect to fines than with respect to incarceration. The United States' silence on these issues, and its failure to offer any contrary understanding of this Court's analysis in *Apprendi*, speaks volumes. It also goes a long way toward explaining why for nearly a decade after *Apprendi* the United States itself took petitioner's position that *Apprendi* of course applies to fines – another matter that the United States declines to address in its brief to this Court.

The United States also does not dispute petitioner's showing that the express language of *Apprendi* and its progeny encompasses punishment and penalties broadly, and is not limited to incarceration. See Pet. Br. 23-25. The United States nevertheless argues that the broad language that this Court consistently has used to state the *Apprendi* principle does not encompass fines because "*Ice* specifically rejected the argument petitioner now makes – that any fact that increases the 'quantum of punishment' must be found by the jury." Resp. Br. 17. But what this Court rejected in *Ice* was the Oregon Supreme Court's holding that *Apprendi* applies to the imposition of consecutive sentences of incarceration because such

sentences for multiple convictions increase the "quantum" of incarceration imposed. *Oregon* v. *Ice*, 555 U.S. 160, 166 (2009). The Court did not address, much less consider, any issues concerning the types of criminal punishment other than incarceration to which *Apprendi* applies. Thus, *Ice* did not "reject" – either explicitly or implicitly – the textual argument that petitioner makes here.

The United States also has no real answer to petitioner's argument that this Court already applied *Apprendi* to fines in *United States* v. *Booker*, 543 U.S. 220, 243-44 (2005), when it rendered advisory *all* of the Federal Sentencing Guidelines, including those that address fines. See Pet. Br. 25-27. The United States correctly points out that *Booker* did not involve fines and that this Court did not expressly mention the Guidelines as to fines, Resp. Br. 18, but the fact remains that this Court's holding and remedy applied to the Guidelines *in toto*, and that the Guidelines as to fines were rendered advisory based on the rationale that this was necessary to bring them in compliance with *Apprendi*. The United States suggests that the Court's wholesale treatment of the Guidelines might have reflected a desire to avoid "'administrative complexities,'" *id.* (citing *Booker*, 543 U.S. at 266-67), but the Court cited this concern as a reason for rejecting a proposal to have "a mandatory system in some cases and a nonmandatory system in others," 543 U.S. at 266, and made no suggestion that it rendered the Guidelines as to fines advisory in order to avoid administrative complexities.

2. Lacking any basis in *Apprendi* and its progeny to distinguish fines from incarceration, the United States is left to argue that fines are a "lesser" – *i.e.*, less severe and less consequential – form of

punishment than incarceration and, therefore, can be imposed even though a defendant has been denied full constitutional protections. Resp. Br. 20. The United States' effort to downplay the significance and impact of criminal fines is at odds with its own claim that the federal government and state governments are increasingly relying on large fines as a critical and potent means of punishing corporations and other wrongdoers for "serious crimes," particularly through statutory schemes such as the RCRA provision at issue here that scale the fine to the "gravity of the offense." *Id.* at 48-50. Such fines clearly impose substantial, if not potentially ruinous, property deprivations that render them a powerful and effective form of criminal punishment, and the United States' claim that it can pursue them without full constitutional safeguards is shocking. See Brief for the Chamber of Commerce of the United States of America and the National Association of Criminal Defense Lawyers as *Amici Curiae* in Support of Petitioner (Jan. 19, 2012) at 3-4 ("Chamber/NACDL Merits Br.") (noting that prosecutors "regularly" use such fine provisions and that the federal government has obtained criminal fines exceeding $1 billion). Moreover, the larger the fine, the more severe the stigma that attaches to the conviction, which this Court stressed in support of its holding in *Apprendi*, 530 U.S. at 484, and which the United States ignores.[1]

In any event, the United States' position is legally unsound. As petitioner demonstrated, and the

---

[1] The United States points out that *Apprendi* and its progeny focus on the concerns raised by depriving a person of life or liberty, Resp. Br. 19-20, but this reflects only the fact that those cases happened to concern sentences of incarceration or the death penalty.

United States does not dispute, criminal defendants subject to fines are entitled to numerous constitutional safeguards under the Fifth and Sixth Amendments – which apply in all criminal cases. Pet. Br. 47-48. In addition, the United States does not dispute that the drafters of the Bill of Rights singled out fines for special protection from government authority and abuse in the Excessive Fines Clause of the Eighth Amendment. *Id.* at 46-47. The United States contends that "the Eighth Amendment's substantive protection against the imposition of excessive fines reinforces the lack of need to extend *Apprendi*'s procedural right to a jury trial" to fines, Resp. Br. 25, but this argument is flawed. The Eighth Amendment's excessiveness safeguard does not supplant Sixth Amendment rights; it provides a different protection from the jury-trial guarantee, and the Constitution confers both protections. *Apprendi* itself confirms this point. The Eighth Amendment's prohibition of "cruel and unusual punishments" provides a substantive protection against "excessive" incarceration, yet this Court nevertheless recognized the *Apprendi* principle as a fundamental and necessary attribute of the jury-trial guarantee.

The United States relies on the two contexts where this Court's opinions note a difference between the deprivations imposed by fines and incarceration in applying a Sixth Amendment protection: the jury-trial guarantee and the right to counsel in misdemeanor cases. Resp. Br. 20-23. To be sure, this Court's decisions in these areas have acknowledged a difference between the deprivations imposed by these two forms of criminal punishment, but this does not provide a basis for holding that fines categorically are not eligible for *Apprendi*'s protections. As the United

States acknowledges, the jury-trial guarantee is the core Sixth Amendment "premise[]" of the *Apprendi* principle, and this guarantee applies to fine-only sentences, just as it applies to sentences of incarceration. *Id.* at 22-23; *Int'l Union, United Mine Workers* v. *Bagwell*, 512 U.S. 821, 837 & n.5 (1994). Indeed, the United States did not challenge Southern Union's right in this case to a jury trial, even though the company could not have been sentenced to incarceration. Accordingly, whatever distinctions this Court has drawn between fines and incarceration in resolving particular issues involving the jury-trial guarantee, this guarantee indisputably applies in the context of fines and, therefore, *Apprendi*'s principles that safeguard this guarantee also must apply.[2]

Nor is the United States aided by its argument that "in some criminal cases involving fine-only sentences, a defendant has no jury trial right at all." Resp. Br. 25 n.5 (citing *Muniz* v. *Hoffman*, 422 U.S. 454, 475-77 (1975)). It is true that some criminal defendants subject to fines do not have a jury-trial right by virtue of this Court's decisions holding that the jury-trial right does not apply to "petty" offenses, see *Duncan* v. *Louisiana*, 391 U.S. 145, 159-62 (1968) – a category that this Court has never delineated in the context of fines. But it is equally true that some criminal defendants facing incarceration have no jury-trial right, see *Blanton* v. *City of N. Las Vegas, Nev.*, 489

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[2] The United States asserts that *Apprendi* is inapplicable to the sentencing that occurred here, even though "a jury trial [was] required on the underlying crime," Resp. Br. 22, but it cites no authority for that novel proposition, which in any event ignores that the purpose of the *Apprendi* principle's prohibition against certain types of judicial fact-finding at sentencing is to safeguard the jury-trial guarantee.

U.S. 538, 543-44 (1989) (offenses punishable by less than six months imprisonment are presumed "petty"), and this Court nevertheless recognized the *Apprendi* principle in the context of incarceration. Just as the "petty" offense exception to the jury-trial right did not cause this Court to decline to recognize or to limit the *Apprendi* principle in a case involving incarceration, it should not cause this Court to exclude fines from *Apprendi*'s scope.

3. Equally unavailing is the United States' argument that *Apprendi* does not apply to fines because the facts pertinent to fine determinations "typically involve only quantifying the harm caused by the defendant's offense, as opposed to defining a separate set of acts for punishment." Resp. Br. 25; *id.* at 26 ("The factual determination at issue here . . . does not make petitioner's offense different or greater than the offense found by the jury."). This argument was waived because the United States never asserted below that *Apprendi* could not apply in this case, or to fines generally, by virtue of the type of fact-finding involved, and the court of appeals never addressed this issue. See *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 38 (1989) (declining to address argument that the respondent "failed to raise . . . below"). To the contrary, the United States conceded below that *Apprendi* would apply to the factual determination at issue here: "if the rule in [*Apprendi*] extends to fines, the district court was barred from raising section 6298(d)'s fine maximum based on its own findings concerning the number of days that Southern Union violated the statute." Br. for the Appellee, United States of America at 36, *United States* v. *S. Union Co.*, No. 09-2403 (1st Cir. Apr. 8, 2010) (citation omitted) ("U.S. First Cir. Br."); *id.* ("[e]ach daily increment represents a higher statutory maximum").

In any event, the United States' argument is meritless because although *Apprendi* itself and some of its progeny involved the determination of facts that could be characterized as elements of greater offenses, this Court's holding in *Apprendi* was not limited to that context, and extends broadly to "*any* fact" other than the fact of a prior conviction "that increases the penalty for a crime beyond the prescribed statutory maximum." *Apprendi*, 530 U.S. at 490 (emphasis added). As a result, this Court's application of the *Apprendi* principle has never been limited to the "aggravated offense" context, and a central point of *Apprendi* was to reject such labels (including "element" and "sentencing factor") in determining the scope of the jury-trial guarantee. For example, the main sentencing fact at issue in *Booker* was drug quantity, 543 U.S. at 227-28, 235, a matter that more naturally falls under the United States' category of "quantifying the harm caused by the defendant's offense" rather than "defining a separate set of acts for punishment." Resp. Br. 25.

Finally, even if the United States were correct that *Apprendi* only precludes judicial fact-finding that defines a "greater" offense, it is hard to see how the district court's fact-finding here does not qualify. The district court found a 762-day violation of RCRA, an offense that carries a maximum fine of more than $38 million, while the jury verdict supports only a finding of a 1-day violation, which carries a maximum fine of $50,000. Under these circumstances, the district court's fact-finding at sentencing effectively defined an aggravated offense that is not supported by the jury's verdict.

Moreover, as petitioner demonstrated and the United States utterly fails to address, the district court made an even more fundamental Fifth and

Sixth Amendment error by effectively determining Southern Union *guilty* of this aggravated offense. Pet. Br. 29-32. The district court acted as a second jury by weighing the evidence to determine the number of days – beyond the one day that the jury's verdict supported – that RCRA was violated, but without applying the jury's beyond-a-reasonable-doubt standard. This usurpation of the jury's role violated petitioner's constitutional rights and should be reversed.[3]

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THIS COURT'S REASONING IN *OREGON* v. *ICE* SUGGESTS THAT THE *APPRENDI* PRINCIPLE DOES NOT APPLY TO CRIMINAL FINES.

Petitioner showed that the court of appeals erred in relying on *Oregon* v. *Ice*, 555 U.S. 160 (2009), to

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[3] In a back-door attempt to revive its ill-fated harmless error argument, see Opp. 16-20; Cert. Reply 4-8, the United States asserts that it is "extremely unlikely" that the jury disagreed with the district court's finding that the length of the RCRA violation was 762 days. Resp. Br. 27 n.6. The court of appeals, however, stated three times in its unanimous opinion that any *Apprendi* error in this case could *not* have been harmless, *see* Pet. App. 2a, 32a-33a, 34a. The court of appeals' finding is fully supported by the fact that the length of the alleged RCRA violation was a vigorously contested issue at the trial, and that the record contains substantial evidence from which the jury (if asked) could have reached a different conclusion from the district court. *See id.* at 34a; Cert. Reply 6-8. This Court has no reason to revisit this fact-intensive issue.

The United States also continues to misstate that the total fine imposed on petitioner was $6 million. Resp. Br. 2. In fact, petitioner was sentenced to pay $18 million, none of which involved restitution. J.A. 162-63. This Court need not resolve the amount of the fine imposed by the district court.

conclude that the plainly-stated *Apprendi* principle does not apply to criminal fines. Pet. Br. 32-45. The United States largely fails to respond to petitioner's analysis, which shows that *Ice* was an exceedingly narrow ruling that did not involve a criminal fine and was tailored to the multiple conviction context of that case. *Id.* at 32-34. Rather than focusing on *Ice*'s actual holdings and this Court's statements concerning the limited nature of its inquiry, the United States invokes the single reference to fines in *Ice* upon which the court of appeals relied, see Resp. Br. 17-18, without responding to petitioner's showing that this reference is unquestionably dictum of unclear meaning that is not entitled to any weight in this case, Pet. Br. 34-37.

In reliance on *Ice*, the government also offers a lengthy exposition of the development of criminal fines from common law to the modern era. Resp. Br. 28-45. Much of it is consistent with, and even bolsters, petitioner's historical analysis. Pet. Br. 38-44. In any event, the United States' historical analysis (1) does not demonstrate any historical basis for treating fines differently from incarceration for *Apprendi* purposes; (2) confirms that this case is distinguishable from *Ice*; and (3) confirms that the fact-finding that the district court engaged in here – finding facts in order to increase the maximum available fine under a statutory scheme – bore no resemblance to any historical practice that the Founders would have recognized.[4]

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[4] In addition to demonstrating that the First Circuit's historical analysis was flawed, petitioner showed that the First Circuit's conclusion based on this historical analysis was unsound because that court erroneously believed that modern sentencing practices are subject to the *Apprendi* rule only if they derive from common law sentencing practices that minimized

1. The United States' attempt to construct a historical divide between sentencing practices governing fines and those governing imprisonment, based on the premise that judges traditionally had broad discretion over the former but little or no discretion over the latter, does not withstand scrutiny. See Resp. Br. 28-29. As *amici* point out, the conclusion that such a "historical divide" existed is "unfounded." Brief of Criminal Procedure Scholars as *Amicus Curiae* in Support of Petitioner, at 22 ("Scholars' Br."). To begin with, the United States does not take issue with, or address, petitioner's evidence demonstrating that common law judges also generally exercised discretion with respect to prison sentences. Pet. Br. 40-41. Indeed, the United States concedes that judges at common law "had broad sentencing discretion" with respect to common law crimes and "often imposed indefinite periods of imprisonment." Resp. Br. 31.

With respect to early American practice, much of the evidence cited by the United States shows that judges had the *same discretion* with respect to both fines and incarceration. The United States relies on Founding-era statutes passed by Congress to address federal crimes, which gave judges broad discretion in imposing fines. Resp. Br. 36-37 & nn. 11-12. A review of the quoted language from these statutes, however, reveals that they gave judges the *same discretion* with respect to imprisonment. For example, as the United States acknowledges with respect to the Crimes Act of 1790, this statute "set maximum terms of *imprisonment* and maximum *fines*, but otherwise left the sentence to the court's

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judicial discretion. Pet. Br. 44-45. The United States does not respond to this point.

discretion." *Id.* at 36 (citing Act of Apr. 30, 1790, ch. 9, 1 Stat. 112). The United States' own evidence therefore undermines, rather than supports, its position that there is a historical basis for treating fines differently from incarceration for *Apprendi* purposes.

The United States' "historical divide" argument also relies upon the fact that judges historically have had broad discretion in imposing punishments for misdemeanors, including fines (as opposed to felonies, for which the substantive law prescribed specific penalties).[5] Resp. Br. 28-29 (citing *Apprendi*, 530 U.S. at 480 n.7). The flaw in this argument is that imprisonment, just like fines, was one of the common law punishments for misdemeanors. See Rachel Vorspan, *"Freedom of Assembly" and the Right to Passage in Modern English Legal History*, 34 San Diego L. Rev. 921, 933 n.39 (1997) ("*all common law misdemeanors* [were punishable], by a fine or up to life imprisonment at the discretion of the court." (emphasis added)); 1 James Fitzjames Stephen, *A History of the Criminal Law of England* 489-90 (1883) ("[T]here are punishments appointed by the common law, both for misdemeanours at common law and also for those statutory misdemeanours for which no punishment is provided by statute. These are fine and *imprisonment* and whipping." (emphasis added)). Thus, the broad discretion of judges in imposing sentences for misdemeanors extended to imprisonment as well as fines,[6] again refuting the

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[5] The typical punishment for felonies was death. Resp. Br. 32; 1 James Fitzjames Stephen, *A History of the Criminal Law of England* 487 (1883) ("Death was at common law the punishment of all felonies except petty larceny and mayhem.").

[6] *See* 4 William Blackstone, *Commentaries* *371 (referring to "[t]he discretionary fines and discretionary length of

United States' position that fines have a unique history that could lead to a different interpretation of the Sixth Amendment as applied to them.

2. Petitioner demonstrated that the historical record distinguishes this case from *Ice* because in *Ice*, it was undisputed that the jury historically "played *no* role in the decision to impose sentences consecutively or concurrently," 555 U.S. at 168 (emphasis added), while here, the evidence shows that in the years both before and following ratification, juries in some States set fines. Pet. Br. 41-44. The United States acknowledges that some States utilized jury sentencing for fines, Resp. Br. 39, but attempts to discount this evidence because it "does not demonstrate a consensus about the essential components of the jury-trial right," *id.* at 40. But the lack of a "consensus," *i.e.*, the fact that the Founders would have observed varied sentencing practices (the imposition of fines by judges in some States and the imposition of fines by juries in Virginia and other States), differentiates this case from *Ice*.

In *Ice*, the Court concluded that Oregon's practice of allowing judges to find facts authorizing imposition of consecutive rather than concurrent sentences "d[id] not implicate the core concerns that prompted [the] decision in *Apprendi*" because juries historically played "*no* role" in that decision, which instead "rested *exclusively* with the judge." 555 U.S. at 168-69 (emphases added). As the Court explained,

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imprisonment, which our courts are enabled to impose"). The United States quotes other language from the same passage in Blackstone, Resp. Br. 33, but omits this language which makes clear that fines and prison sentences were *both* discretionary in common law England.

because juries had never been tasked with choosing between consecutive and concurrent sentences, under Oregon's scheme "[t]here [was] no encroachment . . . by the judge upon facts historically found by the jury, nor any threat to the jury's domain as a bulwark at trial between the State and the accused." *Id.* at 169. Thus, the fact that the jury had *never played any role at all* in the sentencing practice at issue is what distinguished *Ice* from previous *Apprendi*-line decisions. Here, however, the imposition of fines is *not* a sentencing practice that historically rested "exclusively" with judges rather than juries. Accordingly, *Ice*'s rationale for finding that *Apprendi* does not apply to the sentencing practice at issue in that case is inapposite here, and the First Circuit erred in relying upon it.

Moreover, the United States' attempt to downplay the significance of the use of jury sentencing in Virginia and other early American States by characterizing it as mere "experiment[ation]," Resp. Br. 39, is inaccurate. As *amici* Criminal Procedure Scholars explain, "[t]he role of the jury from its earliest incarnations in medieval England has often encompassed some form of sentencing." Scholars' Br. at 19. Indeed, "English jurors in many different kinds of courts *often* imposed sentences, and . . . continued to do so throughout the Middle Ages, and even, at least in some manorial courts, as late as the seventeenth century." Morris B. Hoffman, *The Case for Jury Sentencing*, 52 Duke L.J. 951, 959 (2003) (emphasis added). This practice of involving juries in sentencing proceedings carried over to colonial America, where "[s]everal colonies rejected what they perceived was the traditional English rule of judge sentencing, as weak as it was, and involved their jurors in both capital and noncapital sentencing." *Id.*

at 963. Accordingly, the practice of jury sentencing in several early American States (which applied to imprisonment as well as fines) was not an "experiment" or a departure from the common law. Instead, it was a practice that was based in long-standing common law tradition, and in some States including Virginia, continues today. *Id.* at 966 & n.58.

3. The United States also asserts that "the relevant question" following *Ice* is "whether the jury-trial right 'at common law' included finding facts that increased the amount of criminal fines." Resp. Br. 38 (quoting *Ice*, 555 U.S. at 170). This test, however, does not follow from either *Ice* or *Apprendi*. Although this Court in *Ice* examined common law practices, it did not address fines and had no occasion to articulate the test that the United States posits. And this Court did not articulate or apply this test in *Apprendi*. Indeed, if this Court had applied that test in *Apprendi*, then *Apprendi* would have come out the other way because juries did not traditionally play this role in setting prison sentences, either. As the United States acknowledges, *judges* usually decided how long the term of imprisonment would run. See *id.* at 31-32, 36-37 & nn.11-12.

Moreover, the United States' evidence that English and American statutes did not often set the amount of fines, Resp. Br. 32-33, 35-38, and even more rarely specified that the amount of a fine depended upon a particular finding of fact, *id.* at 40-43, also supports, rather than undermines, petitioner's position. Petitioner itself acknowledged that fines in common law England and the American colonies generally were imposed without any meaningful statutory constraint. See Pet. Br. 38-39 (noting that the historical record largely concerns "sentencing

practices for fines that were not, as here, limited by statute"); *id.* at 39 n.11 (noting that the discretion of English judges in setting fines "appear[ed] to be the case because fines generally were not statutorily fixed"). And petitioner has never claimed that statutes, which historically played little role in establishing the amount of fines in any event, typically specified particular facts upon which to base the amount of fines.[7]

As petitioner showed, Pet Br. 22-23, and as the United States does not even address, what this historical record makes clear is that *there was no analog at common law for the type of fine determination that the district court made here*, which involved a statutory scheme that calibrated the fine

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[7] Given the rarity with which fines historically turned upon particular fact-findings specified by statutes, ascertaining the identity of the typical fact-finder (judge or jury), does not seem particularly informative (or even feasible). The United States cites a few nineteenth-century cases suggesting judges could find the value of stolen or illegal goods for purposes of setting a criminal fine, *see* Resp. Br. 42-43, but those cases post-dated the adoption of the Sixth Amendment, and therefore shed no light on the Founders' understanding of the jury-trial guarantee. None of those cases so much as *mentions*, much less analyzes, the Sixth Amendment. Moreover, *United States* v. *Tyler*, 11 U.S. (7 Cranch) 285 (1812), was less than two pages long, was not even argued, and "cit[ed] no authority," Resp. Br. 45 n.17; *United States* v. *Mann*, 26 F. Cas. 1153 (C.C.D.N.H. 1812) (No. 15,718), was one *paragraph* long and merely cited back to *Tyler*; and *United States* v. *Murphy*, 41 U.S. (16 Pet.) 203 (1842), concerned the victim's competency to testify, *not* the defendant's jury-trial right. At most, these cases show that judges in the early Republic *sometimes* found facts relevant to criminal fines. In other cases, the jury found such facts. *See* Resp. Br. 43 (citing *United States* v. *Holland*, 26 F. Cas. 343 (C.C.S.D.N.Y. 1843) (No. 15,378), a case from the same time period, in which the "district court instructed the *jury* to find the value of the goods.") (emphasis added).

based on a particular fact (the number of days of the criminal violation) and findings by the court (but not the jury) of that fact. Unlike judges who historically had little or no statutory constraints and set fines based largely upon their assessment of the severity of the crime and the defendant's wealth and ability to pay, the district court found facts that the jury did not find, and used those purported facts to impose a fine that exponentially exceeds the maximum penalty authorized by the jury's verdict alone. Because the fact-finding that the district court engaged in here seriously erodes the fundamental protections of the jury-trial right and bore no resemblance to any historical practice that the Founders would have recognized, it cannot be consistent with their understanding of the Fifth and Sixth Amendments.

III. APPLICATION OF THE *APPRENDI* PRINCIPLE TO FINES WOULD IMPROVE, NOT IMPAIR, THE ADMINISTRATION OF JUSTICE.

The United States' assertion (Resp. Br. 45-52) that application of the *Apprendi* principle to fines would "[i]nterfere [w]ith [l]egislative [p]rerogatives" and "the administration of criminal justice" reflects well-worn claims that the United States and others have raised in prior cases involving the application of *Apprendi*.[8] As this Court consistently has held, however, its decisions in this area "cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice." *Blakely* v.

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[8] *See, e.g.*, Br. for the United States, *United States* v. *Booker & Fanfan*, 2004 WL 1967056, at *54-59 (U.S. Sept. 1, 2004); Br. for the United States as *Amicus Curiae* Supporting Respondent, *Blakely* v. *Washington*, 2004 WL 177025, at *25-34 (U.S. Jan. 23, 2004); Br. for the State of Washington, *Blakely* v. *Washington*, 2004 WL 199237, at *36-40 (U.S. Jan. 23, 2004).

Washington, 542 U.S. 296, 313 (2004); see also *Booker*, 543 U.S. at 243-44 ("We recognize, as we did in *Jones*, *Apprendi*, and *Blakely*, that in some cases jury factfinding may impair the most expedient and efficient sentencing of defendants. But the interest in fairness and reliability protected by the right to a jury trial . . . has always outweighed the interest in concluding trials swiftly."). Accordingly, practical and law enforcement considerations cannot alter the clear conclusion that defendants subject to fines are entitled to the constitutional protections recognized in *Apprendi*.

In any event, the concerns that the United States raises have little force, if any. Prosecutors (as well as Congress and state legislatures) have learned to comply with *Apprendi* in the context of incarceration, and there is no reason to think that they would have any difficulty complying with it in the context of fines. Moreover, as petitioner has demonstrated, judicial consensus prior to the decision below was that *Apprendi does* apply to the imposition of criminal fines, and the United States shared that view. See Pet. Br. 27-29. As a result, many federal and state prosecutors already have been complying with *Apprendi* in cases involving potential fines, without any of the difficulties or dire consequences that the United States posits. Indeed, the fact that no State even bothered to file an amicus brief in support of the United States in this case confirms how little *Apprendi*'s application to criminal fines will interfere with the administration of justice.

The United States' assertion that sentencing innovations such as fine-per-day provisions and fines set as a multiple of the gain or loss would be "undone" by the rule petitioner advocates is misguided. Resp. Br. 48. Legislatures would remain free to structure

fines based on "facts that quantify the harm caused by the offense" or the duration of the offense, *id.*, so long as the charging practices and the fact-finding at sentencing conform with *Apprendi*. The United States' suggestion that numerous federal and state statutes would have to be rewritten because their current "language and structure" dictate that "judges are to find" the pertinent facts is overstated. *Id.* at 46-48. With respect to 42 U.S.C. § 6928 (the RCRA provision at issue here), 18 U.S.C. § 3571(d) (the federal alternative fine provision that provides for fines of up to twice the defendant's gain or twice the victim's loss), and all of the other federal fine-per-day provisions that the United States cites, Resp. Br. 6a-7a, these penalty provisions simply set forth the potential fines and other punishments for the violation and do not specify, or somehow "reveal," *id.* at 46, any Congressional intent that the judge determine either the number of days of violation or the gain/loss amount.[9] With respect to the numerous state provisions that the United States cites, some "assume that judges, not juries," *id.*, will determine the pertinent facts such as the gain/loss amount, see, *e.g.*, *id.* at 14a-17a, while others are like the federal provisions and do not reveal any "legislative prerogative" as to who the fact-finder should be.[10]

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[9] The United States' reliance on *United States* v. *Chemetco, Inc.*, 274 F.3d 1154 (7th Cir. 2001), Resp. Br. 46, in support of its contention that the Clean Water Act contemplates that a judge is to find the number of days of criminal violation after a conviction, is puzzling because the United States conceded in its brief to the First Circuit that *Chemetco* "incorrectly interpreted [the] maximum-fine-per-day-of-violation provision of the Clean Water Act." U.S. First Cir. Br. at 36.

[10] *See, e.g.*, Ark. Code Ann. § 12-79-106; Fla. Stat. Ann. § 403.727(3)(b); Me. Rev. Stat. Ann. tit. 38, § 1319-T; N.M. Stat. Ann. § 69-36-18(A); Tex. Nat. Res. Code Ann. § 91.604(b).

Accordingly, the amount of statutory revision that could result from application of the *Apprendi* principle to fines is far more modest than the United States contends.[11]

The United States' suggestion that environmental and other prosecutions would be "hamper[ed]" by application of the *Apprendi* principle to fines is based mostly on the alleged difficulties of obtaining jury findings with respect to gain or loss amounts. Resp. Br. 50-51. No such difficulties arose in this case, however, where the government specified the dates relevant to the fine-per-day provision in the indictment, J.A. 104, and put on its evidence at the trial. Indeed, in all cases where the pertinent factual issue under the fine provision is the duration of the violation, neither prosecutors nor juries should have any difficulty with that sort of issue, which they routinely confront in conspiracy, drug trafficking and other types of cases. Moreover, the Antitrust Division of the Justice Department was successfully able to pursue fines under § 3571(d) during the years when the United States recognized that it had to comply with *Apprendi*. Chamber/NACDL Merits Br. at 7-9; see also *id.* at 9-10 (showing that federal prosecutors in the Second and Seventh Circuits, who have been complying with *Apprendi* in cases involving criminal fines as required by circuit authority, have not been hampered in their ability to pursue or collect fines).

Finally, the United States wholly fails to address petitioner's showings that eliminating fines from the

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[11] Again, the United States' claim that state legislative prerogatives and law enforcement interests would be adversely affected by a holding that *Apprendi* applies to fines is undermined by the fact that no State chose to participate here.

scope of *Apprendi*'s protections would in fact impair the fair administration of justice by making innocent defendants more likely to plead guilty and by creating thorny difficulties for the application of the Federal Sentencing Guidelines. Pet. Br. 51-52; Chamber/NACDL Merits Br. at 5-7 (noting that the "perverse incentive" for innocent defendants to plead guilty is "even stronger when the defendant is a corporation"). Even if ease of the administration of justice could trump the fundamental constitutional guarantee embodied in *Apprendi*, this factor actually weighs in favor of applying the principle to criminal fines.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed, the sentence vacated, and the case remanded for resentencing.

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SOUTHERN UNION COMPANY,
Petitioner,

v.

UNITED STATES,
Respondent.

**On Writ Of Certiorari
To The U.S. Court Of Appeals
For The First Circuit**

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are the Chamber of Commerce of the United States of America (the "Chamber") and the National Association of Criminal Defense Lawyers ("NACDL"). The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, it regularly files *amicus* briefs in cases raising issues of vital concern to the Nation's business community.

NACDL is a nonprofit, professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of criminal wrongdoing. It has over 11,000 members and over 40,000 affiliate members, including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL regularly files *amicus* briefs in cases implicating the rights of criminal defendants.

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[1] Each party has consented to the filing of this brief. No party's counsel authored this brief in whole or in part. And no party, party's counsel, or person other than *amici*, their counsel, or their members made a monetary contribution intended to fund this brief's preparation or submission.

Amici share an interest in ensuring that the constitutional right to have "any fact ... that increases the maximum penalty for a crime ... be ... submitted to a jury, and proven beyond a reasonable doubt," *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000), applies to criminal fines. The First Circuit, however, held that *Apprendi* does not apply to criminal fines. In its view, facts that increase the maximum fine need only be proven to a sentencing judge by a mere preponderance of the evidence. Because this decision denies defendants their constitutional rights and creates perverse incentives for innocent defendants to plead guilty, *amici* respectfully urge this Court to reverse.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Apprendi*, this Court clearly held that, under the Fifth and Sixth Amendments, defendants have the right to have "any fact ... that increases the maximum penalty for a crime ... be ... submitted to a jury, and proven beyond a reasonable doubt." 530 U.S. at 476. The rationale was straightforward: Criminal punishment is the most serious sanction the law allows, so the government should have to establish any facts that increase the defendant's maximum criminal penalty according to the most demanding standard known to the law.

While *Apprendi* dealt with incarceration and not fines, fines are a very significant aspect of the criminal justice system that should be entitled to just as much constitutional scrutiny. In many criminal prosecutions, the most significant part of the penalty is the fine. Moreover, in cases where the defendant is

a corporation, because a corporation cannot be incarcerated, the fine is not merely the most significant part of the penalty; it *is* the penalty.

Some criminal statutes provide for fines of up to twice the amount of gain or loss, no matter the size.[2] And many regulatory statutes authorize criminal fines of up to tens or hundreds of thousands of dollars—sometimes even $1 million—*per day* of noncompliance, no matter how long the duration.[3] Prosecutors use these provisions regularly. For example, the federal twice-the-gain-or-loss provision, 18 U.S.C. § 3571(d), has been used to obtain fines of hundreds of millions of dollars for price fixing in violation of the Sherman Act, for which conviction alone authorizes a fine of no more than $100 million (and, until 2004, no more than $10 million). *See, e.g.*, Judgment at 1–2, *United States v. LG Display Co.*,

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[2] The federal system and many states have general statutes making *any* financial crime punishable by up to twice the gain or loss. *See, e.g.*, 18 U.S.C. § 3571(d); Fla. Stat. Ann. § 775.083(1)(f); N.J. Stat. Ann. § 2C:43-3(e); Haw. Rev. Stat. § 706-640(1)(f); Ky. Rev. Stat. § 534.030(1); N.Y. Penal Law § 80.00(1)(b); Pa. Cons. Stat. § 1101(8).

[3] *See, e.g.*, 12 U.S.C. § 1467a(h)(i)(1)(B) ($1 million per day of certain Holding Company Act violations); *id.* § 1847(a)(2) ($1 million per day of certain Federal Deposit Insurance Act violations); *id.* § 3111 ($1 million per day of certain International Banking Act violations); 33 U.S.C. § 1319(c)(2) ($100,000 per day of certain Clean Water Act violations); 42 U.S.C. § 4910(a)(1) ($50,000 per day of certain Noise Control Act violation); *id.* § 6928(d) ($50,000 per day of certain Resource Conservation and Recovery Act violations).

Ltd., No. 08-CR-803-SI (N.D. Cal. Dec. 23, 2008) ($400 million fine for one Sherman Act violation); Judgment at 1–2, *United States v. F. Hoffmann-La Roche Ltd.*, No. 99-CR-184-R (N.D. Tex. May 20, 1999) ($500 million fine for one Sherman Act violation). Section 3571(d) also has been used to extract hundred-million-dollar fines for failing to follow proper accounting procedures in violation of the Foreign Corrupt Practices Act ("FCPA"), a violation normally punishable by a fine of no more than $25 million. *See, e.g.*, Judgment at 1–2, 5, *United States v. Siemens Aktiengesellschaft*, No. 08-CR-367-RJL (D.D.C. Jan. 6. 2009) ($448.5 million fine for two FCPA violations). The same provision has been used to obtain a fine exceeding $1 billion for violation of the Food, Drug & Cosmetic Act, for which conviction alone authorizes a fine of no more than $500,000. *See* David Sell, *U.S. Attorney in Philadelphia Tackles Health-Care Fraud*, Philadelphia Inquirer, May 14, 2011, at A11.

The First Circuit held that *Apprendi* does not apply to criminal fines. Under the decision below, prosecutors need only prove facts that increase the maximum fine to a sentencing judge by a preponderance of the evidence. For many defendants, such as corporations, the import of the First Circuit's decision is that they lack the constitutional rights confirmed in *Apprendi*.

Amici agree with Petitioner that, as a matter of law, the First Circuit's decision is wrong and must be reversed. Neither the text of the Fifth and Sixth Amendments nor this Court's decisions interpreting that text support the First Circuit's interpretation limiting *Apprendi* to incarceration. *Amici* submit this

brief (a) to explain the practical effects that removing *Apprendi*'s protections from criminal fines will have on innocent defendants, and (b) to show how applying *Apprendi* to criminal fines will not hamper law enforcement from obtaining sentences of fines against guilty defendants.

First, exempting criminal fines from *Apprendi* makes innocent defendants more likely to plead guilty. When faced with the prospect of a potentially astronomical fine that the government need only prove by a preponderance of the evidence, some innocent defendants will prefer to plead guilty rather than rolling the dice at trial.

Second, subjecting criminal fines to *Apprendi* will not impair prosecutors' ability to enforce the law against defendants that actually are guilty. Prosecutors have previously operated as if *Apprendi does* apply to criminal fines, and their experience suggests that doing so has not undercut their ability to fight crime.

ARGUMENT

I. Exempting criminal fines from *Apprendi* makes innocent defendants more likely to plead guilty.

A. The mere existence of twice-the-gain-or-loss and duration-of-offense fines already provides a powerful incentive for even innocent defendants to plead guilty. Consider a hypothetical innocent defendant charged with defrauding his alleged victims of $5 million. And suppose the jurisdiction has a twice-the-loss provision similar to 18 U.S.C. § 3571(d). The prosecutor tells the defendant that, if

he pleads guilty and saves the government the cost of a trial, the prosecutor will recommend a fine of $1 million; otherwise, the prosecutor will push for something larger. The mere prospect that the prosecutor could convince a judge to award a $10 million fine if the jury finds him guilty may render the plea an offer he cannot refuse.

The First Circuit's decision compounds this existing dynamic because it makes it dramatically easier for prosecutors to prove the predicate facts that trigger twice-the-gain-or-loss and duration-of-offense fines. This is true for two primary reasons. *First*, and most obviously, the decision below dramatically lowers the prosecution's burden of proof. *Apprendi* requires proof beyond a reasonable doubt, the highest standard known to the law. The decision below, however, permits the prosecution to prove the predicate facts by a mere preponderance of the evidence. Evidence that is barely stronger than equivocal will pass muster. *Second*, the decision deprives the defendant of the opportunity to make his case to a tribunal composed of his peers. *See Blakely v. Washington*, 542 U.S. 296, 306 (2004) (explaining that the Framers intended the jury to "function as circuit-breaker in the State's machinery of justice").

B. The perverse incentive to plead guilty created by the decision below is even stronger when the defendant is a corporation. Because corporations cannot be incarcerated, criminal fines are the only potential penalty. Under the First Circuit's rule, a corporation facing criminal penalties would be entirely deprived of *Apprendi*'s constitutional protection.

The potential effects of undeserved guilty pleas by corporations cannot be brushed aside. A guilty plea by a corporation will not only result in payment of financial penalties, but could result in the loss of a license, *see, e.g.*, 7 U.S.C. § 12a(2)(D) (commodities dealers); 12 U.S.C. § 1818(e)(1)(A)(i)(I) (federal banks); 15 U.S.C. § 77t(b) (securities dealers), debarment in the case of a government contractor, *see* 48 C.F.R. § 9.406-2, and significant reputational harm. These effects are felt not only by the corporation itself, but by the corporation's individual shareholders and by the corporation's employees, who may face loss of employment and retirement benefits. *See* Ellen S. Podgor, *White-Collar Innocence: Irrelevant in the High-Stakes Risk Game*, 85 Chi.-Kent L. Rev. 77, 78–79 (2010) (describing fallout from wrongful conviction of Arthur Andersen LLP); John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 Am. Crim. L. Rev. 1329, 1341 & n.44 (2009).

II. Subjecting criminal fines to *Apprendi* will not prevent prosecutors from enforcing the law.

As the experience of several federal prosecutors' offices shows, subjecting criminal fines to *Apprendi* will not prevent law enforcement from pursuing defendants that actually are guilty.

A. The Antitrust Division uses the Sherman Act to combat price fixing and promote commercial competition. But, because the maximum penalties authorized by a Sherman Act conviction ($1 million for individuals and $100 million for corporations) often amount to significantly less than the damage

done by the most harmful anticompetitive behavior, the Division in these most critical cases turns to the federal twice-the-gain-or-loss fine provision, 18 U.S.C. § 3571(d). *See* Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, U.S. Department of Justice, Antitrust Division, *Antitrust Sentencing in the Post-Booker Era: Risks Remain High for Non-Cooperating Defendants*, Remarks Before the American Bar Association Section of Antitrust Law (Mar. 30, 2005).

After *United States v. Booker*, 543 U.S. 220 (2005), the Antitrust Division recognized that proving gain or loss by a preponderance of the evidence to seek a fine in excess of the Sherman Act maximum no longer would pass *Apprendi* muster. So, it began alleging gain and loss figures in its indictments and preparing to prove them beyond a reasonable doubt to the jury. *Criminal Remedies: Hearings Before the Antitrust Modernization Commission* 38 (2005) (testimony of Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, U.S. Department of Justice, Antitrust Division).

The evidence indicates, however, that this has not hampered the Antitrust Division's ability to use Section 3571(d) to obtain fines well above the Sherman Act maximum.[4] Specifically, four of the top five

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[4] Accordingly, even though the Antitrust Division now takes the view that, as a matter of law, *Apprendi* does not apply to criminal fines, *see* United States' Reply in Support of Motion for Order Regarding Fact Finding for Sentencing under 18 U.S.C. § 3571(d), *United States v. AU Optronics Corp.*, NO. 09-CR-110 (continued...)

Section 3571(d) antitrust fines imposed upon corporations in the past quarter-century—fines between three and four times the Sherman Act maximum—have been obtained *after* the Antitrust Division began treating *Apprendi* as applicable to criminal fines.[5]

B. The Northern District of Illinois is the busiest district in the Seventh Circuit, and its U.S. Attorney's Office brings some of the Circuit's most sophisticated and noteworthy prosecutions. Yet, following the Seventh Circuit's holding in *United States v. LaGrou Distribution Systems, Inc.*, 466 F.3d 585, 597 (7th Cir. 2006), that *Apprendi* applies to criminal fines, that Office does not appear to have experienced a downturn in its fine collection. In fact, in that district, the average median fine-plus-restitution award since *LaGrou* is more than triple what it was before.[6]

(N.D. Cal. July 11, 2011), it does *not* argue that, as a matter of practicality, subjecting criminal fines to *Apprendi* prevents it from enforcing the Sherman Act effectively.

[5] *See* U.S. Department of Justice, Antitrust Division, *Sherman Act Violations Yielding a Corporate Fine of $10 Million or More* (Dec. 20, 2011), available at http://www.justice.gov/atr/public/criminal/sherman10.pdf.

[6] *See* U.S. Sentencing Comm'n Fiscal Year By-District Data, found in the Commission's Sourcebooks, available at http://www.ussc.gov/Data_and_Statistics/archives.cfm.

C. The U.S. Attorney's Office for the Southern District of New York brings some of the most important financial prosecutions in the country. While the Second Circuit only recently held that *Apprendi* applies to criminal fines, *see United States v. Pfaff*, 619 F.3d 172, 175 (2d Cir. 2010), prosecutors in the Southern District do not appear skittish about preparing to prove gain or loss beyond a reasonable doubt in order to seek high fines using Section 3571(d), even when such gain or loss could soar into the hundreds of millions of dollars, or higher. For example, the Office has announced that it is prepared to seek a twice-the-gain-or-loss fine against three Swiss bankers who allegedly conspired to hide more than $1.2 billion from the IRS.[7]

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[7] U.S. Attorney, Southern District of New York, Manhattan U.S. Attorney Charges Three Swiss Bankers with Conspiring to Hide More than $1.2 Billion in U.S. Taxpayer Accounts from the IRS (Jan. 3, 2012), available at http://www.justice.gov/usao/nys/pressreleases/January12/berlinkafreiandkellerindictmentpr.pdf; *see also* U.S. Attorney, Southern District of New York, Manhattan U.S. Attorney Charges Two Swiss Bankers with Conspiring to Hide More than $600 Million in U.S. Taxpayer Accounts from the IRS (Oct. 11, 2011) (preparing to seek twice-the-gain-or-loss fine), available at http://www.justice.gov/usao/nys/pressreleases/October11/casadeifrazzettoindictmentpr.pdf; U.S. Attorney, Southern District of New York, Manhattan U.S. Attorney Charges Former UBS Banker and Financial Adviser with Conspiring to Hide More than $215 Million in Swiss Bank Accounts (Aug. 4, 2011) (same), available at http://www.justice.gov/usao/nys/pressreleases/August11/gislergianindictmentpr.pdf.

Subjecting criminal fines to *Apprendi* will not cause law enforcement to grind to a halt. The decision below, then, cannot be justified even on pragmatic grounds.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF CRIMINAL PROCEDURE SCHOLARS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

Amici are professors of criminal procedure who have taught about and researched the Sixth Amendment's right to a jury trial. They are concerned that the interpretive approach to the Sixth Amendment adopted by the court below, which uses common law practice as the baseline to measure the contours of the Sixth Amendment's jury trial right, would force this Court to reconsider countless prior decisions that have rejected common law practice as the touchstone for the Sixth Amendment's jury trial right and skew this Court's future analysis of Sixth Amendment issues.

SUMMARY OF ARGUMENT

In resolving whether defendants subject to criminal fines are entitled to the protections articulated in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the court below erred in construing the Sixth Amendment to incorporate only those rights enjoyed in jury trials in 1789. This Court explicitly has rejected the common law benchmark in construing the Sixth Amendment on other occasions and found that jury trial rights enjoyed under the Sixth Amendment are not congruent with those at common law. *See, e.g.*, *Apodoca v. Oregon*, 406 U.S. 404 (1972); *Williams v. Florida*, 399 U.S. 78 (1970);

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[1] The parties have consented to the filing of this brief. The letters granting consent are filed herewith. This brief was not written in whole or in part by counsel for any party, and no person or entity other than *Amici Curiae* and their counsel has made a monetary contribution to the preparation and submission of this brief.

Duncan v. Louisiana, 391 U.S. 145 (1968). This Court instead has found that historical practice provides just one benchmark for understanding the text of the Sixth Amendment's jury trial right, and that the focus rather should be on the underlying principles articulated in the various clauses of the Sixth Amendment. *Blakely v. Washington*, 542 U.S. 296, 301-02 (2004); *Williams*, 399 U.S. at 99-100. Indeed, a comparison to the Seventh Amendment's focus on "preserv[ing]" the jury trial right as it existed at common law highlights the lower court's error – the Sixth Amendment in contrast to the Seventh should be construed according to traditional means of interpretation, under which historical understandings of common law practice are to provide just one perspective.

In any event, even were common law practice the touchstone for *Apprendi* linedrawing, the court below erred in finding that the common law treated the jury's role in setting fines so distinctly from that in meting prison sentences. Although judges exercised discretion in setting criminal fines at common law in England, the court below skipped over the fact that there is no way to know for sure whether the common law would have vested judges with *comparable* discretion in setting the terms of incarceration, because legislatures seldom provided indeterminate prison sentences as a punishment option. Moreover, by the colonial period, juries in some jurisdictions exercised significant authority over criminal fines just as they began to do for incarceration. Even if the historical question cannot be answered definitively, there is considerable evidence suggesting that the jury's role in the

colonial period was similar in setting fines as for assessing the length of sentences.

ARGUMENT

I

THE COURT BELOW ERRED IN CONSTRUING THE SIXTH AMENDMENT BY FOCUSING EXCLUSIVELY ON COMMON LAW PRACTICE

The First Circuit's Decision

In resolving the case below, the court relied almost entirely on what it believed to be the common law practice of jury factfinding. It repeatedly stated that juries determined punishment related to imprisonment or death, but not for fines – "judges had discretion to determine the amount of any fine imposed, and the range was apparently without limit." *United States v. Southern Union Co.*, 630 F.3d 17, 35 (1st Cir. 2010) (citation omitted). The court construed this Court's decision in *Oregon v. Ice*, 555 U.S. 160 (2009), to call for such extensive focus on common law practice – "The Court expressly considered the history at common law of the practice Ice challenged." 630 F.3d at 34. Indeed, it purported to apply "the method of historical analysis endorsed by *Ice*." *Id.* The court below continued that "[a]pplying *Ice*'s reasoning and logic to the issue in this case, it is now highly relevant that, historically, judges assessed fines without input from the jury." *Id.* at 35. Indeed, historical evidence that the defendant presented as to the practice at the turn of twentieth century "is of little utility where the inquiry concerns the role of the jury at common law." *Id.* at 35 n.16.

This Court, however, has never held that the Sixth Amendment freezes rights as understood at common law. Far from it, for the Court not only has construed the Sixth Amendment with reference to its underlying principles even when not supported by common law practice, but also explicitly rejected elements of common law practice in fleshing out the meaning of the constitutional text.

To be sure, this Court in *Ice* cited from the historical record in holding that "[t]he decision to impose sentences consecutively is not within the jury function that extends down centuries into the common law." 555 U.S. at 168 (citation omitted). Yet, the historical inquiry was just *one part* of the Court's effort to understand the meaning of the right to a jury trial under the Sixth Amendment. Reasoning from the Amendment's underlying purposes, the Court in *Ice* stated that the "Federal Constitution's jury-trial guarantee assigns the determination of certain facts to the jury's exclusive province." *Id.* at 167. The decision whether to impose sentences for multiple offenses concurrently or consecutively was not directly related to the jury's role to serve "as a bulwark at trial between the State and the accused." *Id.* at 169. To the Court, a judge's decision as to whether defendants should serve multiple sentences consecutively did not take away from the jury's critical roles of protecting the defendant at trial and in setting punishment for each separate offense. History was not dispositive.

In addition to the historical references, the Court also pinned its decision on "respect for state sovereignty" in that "administration of a discrete

criminal justice system is among the basic sovereign prerogatives States retain." *Id.* at 168. The majority plainly envisioned that federal and state courts might have different rules for jury factfinding given that the Court has "long recognized the role of the States as laboratories for devising solutions to difficult legal problems." 555 U.S. at 171. Mindful of the practical difficulties that would arise from extending *Apprendi* to imposition of a sentence "for multiple offenses," *id.* at 172, this Court deferred to Oregon's interest in adjusting the line between jury and judicial factfinding when punishment for multiple offenses was at stake. Thus, in maintaining a near exclusive focus on practices in jury trials in 1789, the court below misread *Ice*. This is not to suggest that history should be disregarded (and we believe that the historical record is far murkier than the court assumed), but rather that the methodology of the court below was seriously flawed.

Sixth Amendment Precedent

Even aside from overlooking the federalism linchpin and administrative convenience arguments in *Ice*, the court below erred in assuming an overall Sixth Amendment jurisprudence that attempts to freeze in place jury practice at common law. In *Duncan v. Louisiana*, 391 U.S. 145 (1968), for example, this Court considered whether the Fourteenth Amendment incorporated the Sixth Amendment, which would have made the jury trial right applicable to the states in the same way as to the federal government. In holding that the Sixth Amendment was incorporated, the Court stated that the Sixth Amendment reflected

> a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. . . . The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.

Id. at 155-56.

The specific question in *Duncan* concerned the seriousness of the offense triggering the jury trial right under the Sixth Amendment – whether indictment for simple battery necessitated convening a jury. To answer that question, the Court looked not to common law practice exclusively, but as well "to objective criteria, chiefly the existing laws and practices in the Nation." *Id.* at 161. Applying such criteria, the Court concluded that Louisiana's practices, "based on past and contemporary standards in this country," *id.* at 162, violated the Fourteenth Amendment because the punishment in the case could have exceeded six months. Thus, this Court never has assessed the right to a jury trial solely based on common law practice. *See also United States v. Reid*, 53 U.S. (12 How.) 361, 364 (1851) (stating that the Sixth Amendment in part was designed to depart from common law rules

restricting defendants' ability to present an effective defense at a jury trial), *overruled in other respects by Rosen v. United States*, 245 U.S. 467 (1918). The overall principle of the jury trial right can be gleaned from history, but not its contours.

Consider, as well, this Court's decision in *Williams v. Florida*, 399 U.S. 78 (1970). There, the issue to be resolved was whether the Sixth Amendment required a jury trial in criminal cases to be tried before twelve jurors. The Court noted that the common law had defined a jury of one's peers to include twelve persons. *Id.* at 88-89. Yet, the Court continued that a proper understanding of the Sixth Amendment "casts considerable doubt on the easy assumption in our past decisions that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution." *Id.* at 92. Construction of the Sixth Amendment convinced the Court that "there is absolutely no indication in 'the intent of the Framers' of an explicit decision to equate the constitutional and common-law characteristics of the jury." *Id.* at 99. Rather, the "relevant inquiry . . . must be the function that the particular feature performs and its relation to the purposes of the jury trial." *Id.* at 99-100. Accordingly, as in *Ice*, the Court allowed the states to fashion for themselves different rules in administering jury trials as long as the rules remained faithful to the key constitutional principle in respecting "the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt and innocence." *Id.* at 100.

Similarly, in *Apodoca v. Oregon*, 406 U.S. 404 (1972), and in its companion case, *Johnson v. Louisiana*, 406 U.S. 356 (1972), the Court rejected historical practice in ruling that the Sixth Amendment did not require verdicts in jury trials to be unanimous in the states. The Court in *Apodaca* recognized that "the requirement of unanimity arose during the Middle Ages and had become an accepted feature of the common-law jury by the 18th century," 406 U.S. at 407-08, but reiterated that the Sixth Amendment did not adopt common law practices wholesale but rather "left such specification to the future." *Id.* at 410. The Court held that a requirement of unanimity does not "materially contribute" to the critical role of juries in interposing themselves between the government and accused. *Id.* Justice Powell's concurring opinion in *Johnson*, which also discussed *Apodaca*, predicated the result on federalism – that states should be able to have the "freedom to experiment with adjudicatory processes different from the federal model." *Johnson*, 406 U.S. at 376 (Powell, J., concurring). *Ice* echoes Justice Powell's sentiments in permitting states the leeway to structure federal constitutional guarantees differently as long as the underlying values of the jury trial right are met. History is just one determinant in understanding the scope of the jury trial right.

Current practice in jury trials has deviated from history in other respects. Most notably, juries in the colonies exercised not only a factfinding function, but one of finding law as well. Juries routinely determined how to interpret the laws relevant to the guilt or innocence of the accused.

Thomas A. Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200 to 1800* (1985); David A. Pepper, *Nullifying History: Modern-Day Misuse of the Right to Decide the Law*, 50 Case W. Res. L. Rev. 599 (2000); Indeed, in *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1 (1794), the Court noted "that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide." *Id.* at 4. Yet it continued that the jury has the right "to judge of both, and to determine the law as well as the fact in controversy." *Id.* The jury's contemporary focus on factfinding reinforces that the jury trial right in the Sixth Amendment did not incorporate all historical practices.[2]

This Court has approached other aspects of the Sixth Amendment with the familiar interpretive lens based on plain language, underlying purpose, and contemporary impact, as well as history at common law. In elaborating on the right to counsel, this Court as in the jury trial context has held that the Sixth Amendment does not incorporate all aspects of the right to counsel at common law. Indeed, at common law, many accused felons did not have the right to appointed counsel. As this Court noted in *Powell v. Alabama*, 287 U.S. 45, 61 (1932), "[i]f recognition of the right of a defendant charged with a felony to have the aid of counsel depended upon the existence of a similar right at common law as it existed in England when our Constitution was adopted, there would be great difficulty in maintaining it." The Framers established the Sixth

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[2] Moreover, the jury trial right at common law, unlike today, was not waivable. *See* Jonathan F. Mitchell, *Apprendi's Domain*, 2006 Sup. Ct. Rev. 297, 300-01 (2006).

Amendment right to counsel in rejection of the common law tradition. *Id.* *See also* John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. Chi. L. Rev. 263 (1978). The expansion of the right to counsel continued during the twentieth century. *See, e.g.*, *Johnson v. Zerbst*, 304 U.S. 458 (1938) (right to counsel for indigents in federal court); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (extending right to indigents in state court). Recent cases such as *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), have been resolved based on an understanding of the Sixth Amendment's guarantee of the right to "assistance of counsel" and not on common law practice. *Id.* at 146.

The notice provision in the Sixth Amendment similarly rejects the common law tradition. Under the Sixth Amendment, criminal defendants have a right to be apprized of all charges against them: "the accused shall enjoythe right . . . to be informed of the nature and cause of the accusation." At common law, however, those accused had no right to see a copy of the indictment specifying the charges against them. John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 Mich. L. Rev. 1047, 1058 (1994). Nonetheless, this Court in *United States v. Van Duzee*, 140 U.S. 169 (1891), stated that such practice was not definitive – in fact, "[t]he object of the constitutional provision was merely to secure those rights which by the ancient rules of the common law had been denied to them." *Id.* at 173.[3]

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[3] Also, consider the Court's approach to the impartial jury requirement in the Sixth Amendment. The jurisprudence that has arisen considers the history in 1789 as only one factor, and focuses more specifically on broader concepts of "democratic

This Court's prior decisions construing what it means to have a "public trial" are to similar effect. Recently in *Presley v. Georgia*, 130 S. Ct. 721 (2010), the Court held that Georgia violated the Sixth Amendment in closing the voir dire of prospective jurors to the public. Neither the majority nor the dissent relied on the practice at common law; rather, the decision focused on how to adapt the public trial principle to the realities of contemporary trial practice. The Court concluded that the proceedings had to be open to the public and that the trial court must on its own "consider alternatives to closure even when they are not offered by the parties," 130 S. Ct. at 724, to ensure compliance with the norm to the extent possible even in exceptional circumstances. In *Waller v. Georgia*, 467 U.S. 39 (1984), the Court held that the "public trial" provision applied to a suppression motion. The Court declined to rely on common law practice but instead cited the similarities that suppression motions shared with bench trials: "The need for an open proceeding may be particularly strong with respect to suppression hearings. A challenge to the seizure of evidence frequently attacks the conduct of police and prosecutor." *Id.* at 47.

The plain language of a particular word or phrase within the Sixth Amendment may lead to a conclusion that the Framers intended common law practices to be followed. For instance, under the

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society and a representative government. *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975). *See also Witherspoon v. Illinois*, 391 U.S. 510 (1968) (focusing on broad constitutional concepts of impartial jury in lieu of history in limiting exclusion of jurors in death penalty case).

Confrontation Clause, this Court has held that the Framers' use of the term "confronted by" referenced a discrete historical practice to be followed. The Clause's "text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement." *Crawford v. Washington*, 541 U.S. 36, 51 (2004). The Court stressed that "[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement." *Id.* at 54. "Confront[ation]," in other words, is a term of art incorporating face to face questioning as at common law. Thus, unlike other clauses in the Sixth Amendment, the Confrontation Clause best is read to refer to common law practices. In contrast, constructions of the jury trial right and right to counsel in the Sixth Amendment have led to no such understanding – this Court has never held that application of those Clauses is to be determined with reference to common law practices because the term "jury" -- unlike "confronted by" -- had no precise commonly understood definition at the time.

In short, the court below incorrectly assumed that the Sixth Amendment incorporated jury trial practices at common law. Rather, this Court has looked to the language of the Sixth Amendment itself as well as its underlying principles, informed in part by history, to resolve the challenges. Although the specific text of some of the guarantees in the Amendment, as in the Confrontation Clause, might militate for following common law practices, the rights to a jury and counsel of one's choice have never been so cabined. This Court has refused to hold that the scope of the Sixth Amendment's jury trial right is coterminous with rights enjoyed at

common law. History is just one determinant in fleshing out the rights accorded by the Constitution.

Accordingly, the court below should have asked whether preserving the jury's factfinding role in setting fines as in setting terms of imprisonment is critical in respecting "the interposition between the accused and his accuser of the commonsense judgment of a group of laymen." *Williams v. Florida*, 399 U.S. 78, 100 (1970). In *Blakely v. Washington*, 542 U.S. 296, 301-02 (2004) (citation omitted), this Court framed the controlling inquiry similarly -- asking whether jury factfinding should be preserved to ensure that "every accusation against a defendant should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors" and "an accusation which lacks any particular fact which the law makes essential to the punishment is no accusation within the requirements of the common law." Finally, in *Ice*, this Court reiterated that the key issue is to preserve "the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense." 550 U.S. at 168. Indeed, the corporation's right to a jury trial hinges on that question because a fine typically is the most serious sanction it can face in criminal proceedings. The court of appeals therefore fundamentally misconstrued this Court's precedents in failing to inquire whether jury findings in this case would have furthered "the jury's historic role as a bulwark between the State and the accused."

The Seventh Amendment Analogue

Comparison of the explicit text of the Seventh and Sixth Amendments further reveals the error of the

court below. The Seventh Amendment provides in pertinent part that "[i]n suits at common law ... the right of trial by jury shall be preserved." In contrast to the Sixth Amendment, the Framers sought to preserve the right to jury trial in one specific set of circumstances – "suits at common law." Not surprisingly, this Court has resolved questions about application of the Seventh Amendment based on whether analogous suits were heard by juries in 1789.

Consider, for example, the Supreme Court's decision in *Feltner v. Columbia Pictures Television*, 523 U.S. 340 (1998). There, the defendant in a copyright infringement action argued that he was entitled to a jury trial over the copyright owner's request for statutory damages. The Court explained that the Seventh Amendment "applies not only to common-law causes of action, but also to 'actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty.'" *Id.* at 348. The Court continued that "[t]o determine whether a statutory action is more analogous to cases tried in courts of law than to suits tried in courts of equity or admiralty, we examine both the nature of the statutory action and the remedy sought." *Id.* After examining the common law precedents, the Court concluded that the practice in England and in the colonies was to try "copyright damages actions at law before juries." *Id.* at 350.

The Court then determined that "[t]he right to a jury trial includes the right to have a jury

determine the *amount* of statutory damages, if any, awarded to the copyright owner." *Id.* at 353 (emphasis in original). The Court stressed that "[i]t has long been recognized that 'by the law the jury are judges of the damages,'" *id.* (citation omitted), and cited *Dimick v. Schiedt*, 293 U.S. 474, 480 (1935), for the proposition that "'the common law rule as it existed at the time of the adoption of the Constitution' was that 'in cases where the amount of damages was uncertain[,] their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it.'" *Feltner*, 523 U.S. at 353. Thus, based on the common law precedents, the Court concluded that the Seventh Amendment entitled the defendant to a jury trial both as to liability and as to the amount of damages.

This Court, therefore, has construed the Seventh Amendment, in accordance with its plain terms, to demand an analysis of whether the particular cause of action and claim for damages would have been tried before a jury at common law. In so doing, it repeatedly has stressed the difficulty of the historical analysis required by the textual command in the Seventh Amendment to "preserve[]" the jury trial right. In *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970), for example, the Court acknowledged that the Seventh Amendment's text, in "requiring extensive and possibly abstruse historical inquiry, is . . . difficult to apply." In concurrence in *Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry*, 494 U.S. 558 (1990) (Brennan, J., concurring), Justice Brennan lamented that "[r]equiring judges, with neither the training nor time necessary for reputable historical scholarship, to root through the tangle of primary

and secondary sources to determine which of a hundred or so writs is analogous to the right at issue has embroiled courts in recondite controversies better left to historians." *Id.* at 576. He continued that "inquiries into the appropriate historical analogs for the rights at issue are not necessarily susceptible of sound resolution under the best of circumstances." *Id.* at 577. Despite the difficulty in assessing the history, the Seventh Amendment's language demands that judges do their best at historical excavation.

In contrast, the Sixth Amendment does not incorporate the jury trial as it existed in 1789 wholesale into its terms and thus an exclusive focus on history under the Sixth Amendment's jury trial clause is not warranted. Moreover, in light of the difficulty in determining clear answers from the often inconsistent and abstruse history of jury trials at common law, this Court should reject the lower court's effort to import the interpretive construct of the Seventh Amendment onto the different text and purpose of the Sixth.

II

TO THE EXTENT THAT THE HISTORICAL PRECEDENT SHAPES THE SCOPE OF THE JURY TRIAL RIGHT UNDER *APPRENDI*, THE COURT BELOW MISREAD THE RELEVANT HISTORY OF JURY PARTICIPATION IN SETTING THE AMOUNT OF CRIMINAL FINES LEVIED

The court below erred not merely in misconstruing this Court's Sixth Amendment methodology, but also in understanding the relevant history at common law. It struggled, as Justice

Brennan forewarned, to "root through the tangle of primary and secondary sources" to find "appropriate historical analogs." Although the record of jury participation in setting criminal fines may not be as pronounced as discussed in *Feltner* for setting civil fines, juries at common law, particularly in the colonies, participated widely in determining the amount of fines to levy. Indeed, as this Court itself noted when considering historical evidence of sentencing for both crimes and fines in *Apprendi*, "[T]he judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury." 530 U.S. at 483 n.10. See, e.g., 530 U.S. at 480 n. 7 (noting historical use of criminal fines to punish misdemeanors). *Id.* at 514 (Thomas, J., concurring) (citing example involving criminal fines).

Evidence Relied on by the Court Below to Conclude that Judges Had Unilateral Power To Impose Fines is Far From Compelling

The court misgauged the historical record in concluding that judges exercised plenary power over criminal fines at common law. The court principally relied on one law review article to reach its conclusion that the jury had no role to play in setting the amount of fines at common law. The court cited Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 Am. J. Legal Hist. 326, 350 (1982), for the proposition that judges had unlimited discretion to determine the amount of any fine imposed. 630 F.3d at 35.

Reliance on that article is misplaced for two reasons. First, Professor Preyer never argues that judges at common law, if they had had the

opportunity, would have exercised greater discretion in setting fines than in setting sentences. Indeed, because incarceration was rarely an option, the issue simply did not arise. Preyer, *supra*, at 349-350 (discussing the penal measures available in colonial America). The court's assertion that judges had discretion in setting fines does not suggest *a different role* in incarceration had legislatures passed laws providing for indeterminate prison stays.[4] Thus, Professor Preyer's article does not support any conceptual difference between the jury's role in sentencing and in setting fines at common law.

Second, Professor Preyer cautioned that "the incompleteness of records" in colonial times makes any generalization hazardous. *Id.* at 347. Indeed, her scholarship did not focus on the allocation of authority between judges and juries at all, but rather on the type of penalties meted. As we discuss below, other evidence from the colonial period, although sketchy, supports the notion that juries enjoyed roughly the same discretion in setting fines as they did for incarceration. Thus, the court below failed to make a persuasive case that the common law vested more discretion in juries in setting terms of confinement as opposed to other criminal penalties.

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[4] The court also cited (630 F.3d at 35 n.15) Professor Erik Lillquist's article *The Puzzling Return of Jury Sentencing: Misgivings about Apprendi*, 82 N.C. L. Rev. 621, 641 (2004), to the effect that incarceration was rarely an option at common law, which only bolsters the obvious – we do not know whether judges would have had greater or less discretion in sentencing than in setting fines.

Evidence Not Examined by the Court Below Confirms That Juries Played a Significant Role in Setting Criminal Fines at Common Law

Evidence unexamined by the court suggests that the jury played a greater role in setting fines at common law than is generally thought. Even on its own terms, therefore, the court's analysis of the historical record is unpersuasive.

The role of the jury from its early incarnations in medieval England has often encompassed some form of sentencing. Morris B. Hoffman, *The Case for Jury Sentencing*, 52 Duke L.J. 951, 958 (2003). Judges in some English criminal courts handled all sentencing, as the court below asserted. However, "it is also clear that English jurors in many different kinds of courts often imposed sentences, and that they continued to do so throughout the Middle Ages, and even, at least in some manorial courts, as late as the seventeenth century." *Id.* at 959.

The early common law period reflects an active role for juries in all forms of sentencing. English juries of the twelfth and thirteenth centuries were quite different from today's juries. At that time, jurors were chosen from the local community of the accused; knowing the defendant was generally a precursor to be chosen to sit on a jury. *Id.* at 956-957; *see also*, Laura H. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 Ind. L. J. 397, 406 (2009) (discussing the English origins of the jury trial). A juror's personal knowledge was part of the evidence, and jurors were not only fact finders; they made inquiries, gathered testimony, weighed evidence, and stated the verdict. Appleman, *supra*, at 406. The juror's role was central to every aspect of the case.

The punishments in English law at the time were few: death, banishment, and corporal punishment and/or fines for the least serious of crimes. J.H. Baker, *An Introduction to English Legal History* 584 (3d ed. 1990) (discussing the system of whippings and fines for misdemeanors). Virtually all offenses had determinate punishments. As Blackstone stated, "judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of the law." 3 William Blackstone, *Commentaries on the Laws of England* * 396. The judge's role, once the jury rendered a verdict, was to announce the punishment mandated by the legislature. One scholar has even referred to English criminal trials as "sentencing proceedings," in which juries imposed sentences by their verdicts. John H. Langbein, *Shaping the Eighteenth Century Criminal Trial: A View from the Ryder Sources*, 50 U. Chi. L. Rev. 1, 41 (1983). The jury's "function in such cases beyond formalizing the inevitable conclusion of guilt... was to decide the sanction." *Id.*

Moreover, juries long had the ability to affect the sentence itself through "downcharging." Unlike today, juries could convict on a lesser offense in order to minimize the sentence meted, even if the lesser offense had not been charged. *Id.* at 41, 51; *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 6.0, 29 December 2011), February 1717, trial of Elizabeth Polson (t17170227-2) (in which the defendant was indicted for breaking into a dwelling with the intent to steal but only found guilty of trespass). Moreover, juries at times decided that particular defendants were

guilty of theft but then used their discretion to reject the valuation of the goods stolen in order to avoid a sentence of death. *See, e.g., Old Bailey Proceedings Online*, January 1715, trial of Rebekah Bottomly (t171501 14-47) (in which "the Jury considering she was young, and that it was her first Offence, brought her in Guilty to the value of 39 s. only). As Professor Langbein summarized, the jury "chose the sanction through its manipulation of the partial verdict." Langbein, *supra*, at 55.

Colonial justice and jury trials varied widely. There were substantial differences among the colonies, and even within colonies, in terms of "social arrangements, populations, ideologies, [and] institutional developments." Douglas Greenberg, *Crime, Law Enforcement, and Social Control in Colonial America*, 26 Am. J. Legal Hist. 293, 296 (1982). As Judge Morris Hoffman relates, certain features of colonial justice were not uncommon, including jury sentencing: "Several colonies rejected what they perceived was the traditional English rule of judge sentencing, as weak as it was, and involved their jurors in both capital and noncapital sentencing." Hoffman, *supra*, at 963. According to Professor William Nelson, colonial juries steered the punishment of offenders, from trial through sentencing. William E. Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society*, 3 *1760–1830* (1975). The jury ruled on both facts and law, and the courts were often left with minor tasks, such as providing jury instructions and handling pleas. *Id.* at 20. The primary purpose of the jury was to serve as a check on judges, a safeguard against arbitrary authority. *Id.*

Perhaps in light of the varied experiences among the colonies, there was little discussion of the "right to a jury trial in the records of the constitutional debates, let alone any discussion of whether juries in criminal cases should continue the colonial practice of imposing sentences." Hoffman, *supra*, at 968. The original version of Article III, drafted by Edmund Randolph, made no provisions for jury trials. Saul K. Padover, *To Secure These Blessings: The Great Debates of the Constitutional Convention of 1787 Arranged According to Topic* 419 (1962). There are no documented "discussions about the allocation of sentencing power as between judge and jury." Hoffman, *supra*, at 969. The written record, therefore, reveals no effort to distinguish the jury's role in setting fines from that in determining incarceration. In light of the mixed colonial practice and the lack of any discussion at the time of the Framing, the First Circuit's effort to construct a historical divide in the Sixth Amendment between a jury's role in incarceration and setting fines is unfounded.

Immediately subsequent to ratification of the Sixth Amendment, many states explicitly delegated discretion to juries over both incarceration and fines. In 1796, Virginia passed an act which endorsed jury sentencing for all criminal offenses, whether for stays in prison or fines. Act of Dec. 22, 1796, § 15, 1796 Va. Acts ch. 2 (1796); *see also,* Nancy J. King, *The Origins of Felony Jury Sentencing in the United States*, 78 Chi.-Kent L. Rev. 937, 943 (2003) ("In general, juries fixed fines in their verdicts."). Kentucky followed suit shortly thereafter, followed by Alabama, Indiana and Mississippi. *See* King,

supra, at 984, 990; *see also*, Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 Va. L. Rev. 311, 318 (2003) (describing practice of jury role in criminal fines in early republic). In states that implemented jury sentencing, judges were entitled to instruct the jury, and were also authorized to intervene in the sentencing process on certain occasions, including to adjust the jury's assessment of fines. Iontcheva, *supra*, at 321.[5] Nonetheless, the initial decision regarding the amount of the fine rested with the jury. State practices near contemporaneous with ratification of the Sixth Amendment reinforce that jury discretion in setting fines and in setting the terms of confinement was viewed comparably. Thus, in colonial times and immediately thereafter, there is much evidence – unexamined by the court below – pointing to a significant jury role in determining criminal fines.

In short, there is scant support for the First Circuit's premise that juries at common law played a larger role in determining prison time than in affixing criminal fines. We just do not know given that so few statutes existed authorizing incarceration. Colonial practice, moreover, suggests that juries often exercised considerable discretion in setting criminal fines. And, there is simply no evidence in the debates leading to ratification of the Sixth Amendment that the Framers intended to preserve jury factfinding in one context but not the

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[5] Many Reformers believed that juries were uniquely capable of meting out appropriate punishment because they, as members of the local community, "know the history of the accused and ... therefore assess the proper punishment accordingly." James P. Jouras, *On Modernizing Missouri's Criminal Punishment Procedure*, 20 U. Kan. City L. Rev. 299, 304 (1952).

other. Thus, the sparse historical record accentuates the First Circuit's error in placing exclusive reliance on common law practice in construing the Sixth Amendment jury trial right.

CONCLUSION

For the foregoing reasons, this Court should reject the interpretive approach to the Sixth Amendment adopted by the court below.

Respectfully submitted,

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APPENDIX

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